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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 619

In the Matter of the Application of
DOLOMITE PRODUCTS COMPANY, INC.,
Appellant,

v.

FRANK F. KIPERS, & ORS.,
constituting the Town Board of the
Town of Gates, New York,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

This is an appeal from the divided opinion of the Court of Appeals, State of New York, upholding the authority of the Town of Gates, New York, to take, constructively, the property of Appellant, Dolomite Products Company, Inc., without compensation, by the enactment of zoning and related licensing statutes. By its Judgment of March 2, 1967 (Motion for Re-Argument decided April 20, 1967), the Court of Appeals, State of New York, has affirmed the opinion of the Appellate Division, Supreme Court, decided

June 25, 1965, reversing the Order of the court of original jurisdiction, dated March 26, 1964. The court of original jurisdiction has twice ruled that Appellant was entitled to the issuance of an excavating permit, pursuant to certain ordinances of the Town of Gates, by virtue of Appellant's bona fide conforming and prior non-conforming use of its property for rock quarry purposes, as a consequence of which, the property was held to meet the zoning restrictions of the 1948 zoning ordinance of the Town of Gates.

The effect of these ordinances, as construed by the Town of Gates, and upheld by the Court of Appeals for the State of New York, is to deprive Appellant, Dolomite Products Company, Inc., without just compensation and due process of law, the right of continued mining of property which has been in its custody and control, and lawfully operated as a dolomite mining facility, continuously since 1925, in contravention of Appellant's rights under the Fifth Amendment as applied to the states under the Fourteenth Amendment to the Constitution of the United States.

Wherefore, Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The court of original jurisdiction wrote an Opinion and Order (42 Misc.2d 11, 247 N.Y.S.2d 396 (1964)) which is set forth at pp. 2-12 of the certified Record on Appeal ("Record") and appended hereto (App., Exh. 3). The Appellate Division's Opinion (23 App. Div. 2d 339, 260 N.Y.S.2d 918 (1965)) (App., Exh. 2) reversing the lower court is set forth at pp. 228-237 of the Record, including the dissenting opinion. On appeal (19 N.Y.2d 739, 279 N.Y.S.2d 192 (1967)) the Court of Appeals divided 4-3 in affirming the opinion of the Appellate Division (App., Exh. 1).

A copy of the Order of the Court of Appeals, certifying the existence of constitutional questions, is appended hereto (App., Exh. 7).

JURISDICTION

(i) This action was commenced below by the filing of a Petition by Appellant pursuant to Article 78 of the Civil Practice Law and Rules praying for the entry of an order ". . . withdrawing . . . and nullifying the purported stop-work order served upon Petitioner [Appellant], and directing the Respondents [Appellees] to approve the application for excavating permits and to issue such permits . . . ." (f. 66) Said Petition alleged facts supporting a claim to prior non-conforming use or a valid extension of such non-conforming use of Petitioner's property for rock quarrying purposes and also alleged that substantially all of such property, in fact, met the zoning restrictions of the 1948 Zoning Ordinance as applied to the existing quarrying use. The Answer of Appellees (Respondents in Special Term) averred that the Ordinance did not permit the use of the subject property for rock quarrying purposes and that there was no prior non-conforming use of such property prior to the enactment of said Ordinance.

(ii) The Final Order of the Court of Appeals was entered on March 2, 1967, and the Order denying Appellant's Motion for Re-Argument was dated April 20, 1967. The Notice of Appeal to this Court (App., Exh. 8) was served on Appellees by mail July 17 and actually filed July 17, 1967, in the Office of the Clerk of the Supreme Court (Monroe County), New York, which is the court possessed of the Record in this case.

(iii) The jurisdiction of the Supreme Court to review this decision on appeal is conferred by Title 28, United States Code, Section 1257(2). The Court of Appeals is the highest court of that state, and the order and judgment of that court affirm (1) the constitutionality of ordinances

which violate the Fifth Amendment to the Constitution as applied to the States under the Fourteenth Amendment and (2) the jurisdiciton of the Appellate Division as to all matters there considered.

(iv) The following decisions sustain the jurisdiction of the Supreme Court to review this decision on appeal from the Court of Appeals: *Pennsylvania Coal v. Mahon,* 260 U.S. 393 (1922); *Lawton v. Steele,* 152 U.S. 133 (1894); *Hadacheck v. Los Angeles,* 239 U.S. 394 (1915); *Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962); *Poulos v. New Hampshire,* 345 U.S. 395 (1953); *Durlay v. Mayo,* 351 U.S. 277 (1956); *Eustes v. Bolles,* 150 U.S. 361 (1893); *Stub v. City of Baxley,* 355 U.S. 313 (1958); *Hartford Life Ins. Co. v. Ibs,* 237 U.S. 662 (1915); *Yates v. United States,* 354 U.S. 298 (1957).

(v) The Zoning Ordinance of the Town of Gates, as amended to January 23, 1948, is set forth in the certified Record at pp. 59-63, and Section 60 thereof, the pertinent portion of that text, is set forth in the Appendix hereto as Exhibit 5. The Excavations Ordinance is set forth as Exhibit A to the Petition below, Record pp. 23-29; Sections 2 and 11 of said Ordinance are reprinted in the Appendix hereto as Exhibit 6.

QUESTIONS PRESENTED

1. Have Appellant's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States—protection against the deprivation and taking of its private property without just compensation and due process of law—been violated by the action of the Appellees in refusing to make the necessary finding as to "pre-existing use" and to thereupon issue the Appellant the necessary permits to allow the Appellant to continue to engage in the lawful occupation of rock quarrying on its property, an occupation in which it has engaged and a use to which it has put its property without interruption since 1925?

2. Are the 1948 Zoning Ordinance, the 1950 Excavations Ordinance and the 1963 Amended Zoning Ordinance of the Town of Gates, as applied to the Appellant and the facts of this case, repugnant to the principles of the Fifth Amendment, as the same are applied by the Fourteenth Amendment to the Constitution of the United States, in that such application resulted in the effective taking and deprivation of Appellant's real property and the termination of the business of Appellant without compensation and due process?

3. Did the Appellate Division of the Supreme Court and the Court of Appeals have jurisdiction to reverse an order of the trial court issued on the basis of two separate and distinct court opinions, both of which independently support such order, where only said order and one such opinion were appealed from and the other opinion became final insofar as it was not appealed from?

STATEMENT OF THE CASE

A. Background

Dolomite was founded in 1920. The negotiations for the purchase of the Bonnet Farm, the property here involved, began in 1923 and were completed in 1925. The 80-odd acre tract, at the time of purchase, was bisected by railroad tracks. In 1924, Dolomite built a dynamite storage magazine on Parcel C, the southern fringe of the Bonnet Farm, with a capacity of two carloads of dynamite, and began storing dynamite there (ff. 530-532). It was trucked off railroad cars to the magazine and then carried back to the operations north of the tracks as needed.

By 1925, Dolomite had spent between $250,000 and $300,000 for equipment (f. 398). In 1929, negotiations were begun with the New York Central Railroad on tunneling under the railroad tracks so that quarrying could be continued south of the tracks without further use of the grade crossing and the rock hauled through the tunnel to

the crushers and graders on the north side of the tracks (ff. 400-402). Accordingly, equipment was purchased for use south of the tracks and cores of rock were submitted to the Director of the Department of Public Works of the City of Rochester as early as 1929 (f. 504), who testified that he then thought ". . . some of them were taken south of the tracks . . . ." (f. 506). He was consulted about a tunnel under the tracks in the late 1930's (ff. 510-511). Stripping of the topsoil on the south side of the tracks was begun somewhere between 1938 and 1942 (f. 510).

The seller of the dynamite to the quarry was first aware of the projected tunnel in 1941 (f. 544), having heard conversations between the City Superintendent of Tunnel Construction, the general superintendent for Dolomite and a Dolomite engineer, with respect thereto (ff. 546-547). In 1955, when quarrying on the north portion of the property had deepened to the point of realistically substituting the tunnel for the surface grade crossing theretofore and then used, prices were obtained from a contractor for such construction (f. 548), and further stripping was begun in anticipation of the construction of the tunnel (f. 551-552). In 1961, piling of a berm of earth was begun on the southeast corner of the property south of the tracks, and drilling was started on the south side of the tracks about the same year (ff. 412, 413). Some blasting was done south of the railroad tracks in 1962 (f. 554).

Further evidence of Appellant's manifested intent is the large and continuing investment in buildings, equipment, trucks, machinery, etc., which would not have been made if the operation was to have been discontinued in the near future (ff. 589-591). Over the years Dolomite has incurred an enormous investment in this property (f. 445) and, wholly aside from the enormous dollar value attaching to a going business of the magnitude of Dolomite, the Gates plant as depreciated at the time of the hearing stood on the books of the company as follows:

$ 254,655.34	– buildings at Gates quarry
1,795,308.75	– machinery at Gates quarry
63,308.74	– trucks at Gates quarry
21,043.28	– autos at Gates quarry
$2,134,316.11	

(ff. 589-91)

B. This Proceeding

In 1948, the part of the farm south of the tracks had been divided by the Zoning Board of the Town of Gates into two parcels which were called Parcels B and C in the courts below. Parcel B, immediately south of the tracks, was zoned "E Industrial" (ff. 242A-252A). Parcel C, to the south of Parcel B, was zoned "Residential". Parcel A consists of all that part of the Bonnet Farm north of the tracks where quarrying had been carried on by Dolomite and its predecessor since about 1908 (f. 361).

This appeal stems from the decision of Mr. Justice Gabrielli as the result of a second hearing. At the first hearing, Mr. Justice Gabrielli, in his opinion (App., Exh. 4), found that under the zoning ordinance here involved, quarrying was permitted on Parcel B because it was a permitted use in an E Industrial zone (f. 245A and App., Exh. 5). No appeal has ever been taken from this decision, which also directed the convening of another hearing to determine whether the doctrine of non-conforming use attached to Parcel C. It is from the decision at the second hearing and the order entered thereon, and that only, that Appellees here appealed to the Appellate Court (Brief for Appellant, p. 2, last sentence). The fact that the Trial Court's second decision–which recites the finding of permitted use (ff. 4-5) –found that Parcel B as well as C was a pre-existing, non-conforming use does not reverse or vacate or in any way change the same court's earlier finding, from which no appeal had been taken, that rock quarrying on Parcel B was a permitted use under the 1948 Ordinance. "[A]ll in accordance with the *opinions* made and filed by the Court herein...."

(App., Exh. 3, emphasis added), the court ordered the Town Board to grant excavation permits provided the petitioner complied with all reasonable and non-confiscatory requirements of the said excavation ordinance, and declared the stop-work orders to be null and void and of no effect.

Dolomite, in its applications for excavation permits (Record, pp. 30-34), divided the lands south of the tracks into Parcels B and C, in recognition of the fact that the issues could be different. With respect to Parcel C, the issue was one of non-conforming use at the time of the making of the application. As to Parcel B, the Court already had determined that the then applicable ordinance permitted the operations which Appellant sought to conduct.

C. Point at Which Federal Questions Were Raised Below

1. Court of Original Jurisdiction

The Affidavit in Support of Petition (pp. 73-80) of Appellant's Treasurer, attached to its Reply below, alleged in Paragraph 15 the confiscation of its property without just compensation in violation of state and federal constitutional guarantees. The court, in granting the Petition, specified its reliance on said affidavit (f. 13).

2. Appellate Court

Appellant's (Respondent's) Brief on Appeal at p. 19 *et seq.* argued that ". . . to zone away the right [to the non-conforming use] would be tantamount to confiscation of the property right without just compensation and violative of the Fifth Amendment of the United States Constitution, as the same is carried and applied to the states through the Fourteenth Amendment." The dissenting opinion holding for Dolomite concluded that it had ". . . a nonconforming use of quarrying in parcel B which is constitutionally protected . . . ." (App., Exh. 2).

3. Court of Appeals

(a) Appellant's Brief in the Court of Appeals (certified Record) at page 23-24 *et seq.* repeated the argument quoted

in paragraph 2 immediately above. The dissenting opinion, in which three justices joined, discusses in detail the constitutional questions involved in this appeal.

(b) The question of the Appellate Court's jurisdiction to vacate an order of the court of original jurisdiction predicated on two separate findings and opinions, either one of which would independently support such order as it related to Parcel B was raised timely in Appellant's Brief to the Court of Appeals beginning at the bottom of page 9 thereof. Appellant's Reply Brief (Point III, p. 3) urged the jurisdictional point even more strongly: The first Order of the Special Term was not before the Appellate Court.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Application of the Subject Ordinances to Appellant's Property and Business Constitutes an Effective Taking, Contrary to the Constitution of the United States

To the extent that

(1) the 1948 Zoning Ordinance deprives the Appellant of the established quarrying use of its property, either by not providing for continuance of a pre-existing use and recognizing valid extensions of such use, or through the arbitrary and erroneous interpretation of said ordinance as not permitting rock quarrying on Parcel B (the opinion of the court of original jurisdiction found to the contrary, ff. 254, 267-268, 270-271, 274, 280);

(2) the superimposing of the 1950 Excavations Ordinance on the 1948 Zoning Ordinance acted to perpetuate said unlawful and erroneous deprivation, in that the Appellant was arbitrarily and capriciously denied the issuance of the excavations permits for the same reason that the 1948 Zoning Ordinance was misconstrued and misapplied, and

(3) the 1963 Amended Zoning Ordinance continues said unconstitutional deprivation of property without due process and compensation (this ordinance is not in evidence and is probably not properly before this court, since it was first raised in the Court of Appeals by counsel for the Town of Gates),

Appellant contends that it has been denied due process of law in that it has been deprived of its property without just compensation – rights guaranteed to the Appellant by the Fifth Amendment as that is applied to the States under the Fourteenth Amendment. A necessary and concomitant consequence of this unconstitutional deprivation is that the ordinances in question are repugnant to said Amendments to the Constitution of the United States.

There is a line of cases recognizing that extractive industries are unique. In such cases, the courts have recognized that a prohibition on the "use" of one's land, which "use" could be moved to another location, was a separate question from a ban on quarrying one's land, which operation could not be shifted at all. *Ex parte Kelso*, 147 Cal. 609, 82 P. 241 (1905); *Hadacheck, supra; McCaslin v. City of Monterey Park*, 163 Cal. App. 2d 400, 329 P.2d 522 (1958); *Lamb v. A. D. McKee, Inc.*, 10 N.J. Misc. 649, 160 A. 563 (1932); *Town of Billerica v. Quinn*, 320 Mass. 687, 71 N.E.2d 235 (1947), cited in *Hawkins v. Talbot*, 248 Min. 549, 551, 80 N.W.2d 863, 865.

> A mineral extractive operation is susceptible of use and has value only in the place where the resources are found, and once the minerals are extracted it cannot again be used for that purpose. "Quarry property is generally a one-use property. The rock must be quarried at the site where it exists or not at all. An absolute prohibition, therefore, practically amounts to a taking of the property, since it denies the owner of the right to engage in the only purpose for which the land is fitted. *Morton v. Superior Ct.*, 124 Cal. App. 2d 577, 582, 269 P.2d 81, 85 (1954)" [*McCaslin, supra*, p. 527].

Goldblatt, supra, also came up from the New York Court of Appeals, on an adverse opinion written by Judge Burke, the Court dividing 4-3. Coincidentally, and of importance, the appeal taken here also involves an opinion of Judge Burke — this time writing for the three dissenting judges and distinguishing this case from *Goldblatt*, finding the ordinance in the latter one of regulation and the instant ordinance ". . . so unreasonable as to amount to an unconstitutional taking." (App., Exh. 1.)

Appellants contend that under either the doctrine of pre-existing use or extension of non-conforming use, or by virtue of its adjudged conforming permitted use, Parcel B of Appellant's property can be legally quarried. The property in question was part and parcel of the purchase of the farm in 1925. There were not three parcels and three deeds; there was but one farm and one deed, artificially bisected by railroad tracks, acquired and in use long before the enactment of the 1948 Zoning Ordinance. All of the property was at all times used in the total operation of quarrying. There was no last-minute, bad faith attempt to "beat the ordinance". Since 1924, the dynamite was stored on the farm property to the extreme south of the tracks (Parcel C), trucked over Parcel B and over the railroad tracks' farm crossing to the current quarry site north of the tracks. Parcel B was in fact a vital cog in the existing quarrying operation as well as being a quarry site in its own right. Parcel B immediately abutted Parcel A to the north but for the tracks.

Great South Bay Marine Corp. v. Norton, 58 N.Y.S.2d 172, 174 (1945) raised the question of what, in fact, constituted the environs of an airport:

> It is commonplace that every square inch of an airport is not used as a flying field, and yet a substantial percentage of an area (all loosely called an airport) is used for purposes more or less incidental to the important use of the other part.
>
> The whole disputed area has been held continuously as a land unit since 1938, but much emphasis

> is laid upon the fact that part of it has been more or less substantially fenced off from another part of it, from which it is sought to argue that the part not fenced-off is the airport and the fenced-off area is not a part of the airport.

Similarly, *Town of Somers v. Camarco*, 126 N.Y.S.2d 154 (1953) (quarry divided by road); *Moore v. Bridgewater Tp.*, 69 N.J. Super. 1, 173 A.2d 430 (1961) (20-acre tract divided by county line, where active quarrying carried on on only six acres in one county); *Borough of Cheswick v. Bechman*, 352 Pa. 79, 42 A.2d 60 (1945) (quarrying on part of 12-acre tract qualified tract for application of pre-existing, non-conforming use doctrine); *State v. Bumgarner*, 110 O.A. 173, 168 N.E.2d 901 (1959) (use of 47 acres for the non-conforming use of quarrying extended to reasonably incidental non-conforming use of adjoining three acres); *Conner v. Township of Chanhassen*, 249 Min. 205, 81 N.W.2d 789 (1957) (condemnation of part of a small tract did not act to sever the extension of the prior, non-conforming use to the remaining parcel). *Lamb v. A. D. McKee, Inc.*, 10 N.J. Misc. 649, 160 A. 563, 564 (1932) (mining sand on one acre of 10-acre tract extended use to entire tract):

> The common pleas judge held that the tract was a unit . . . . That view we think is sound. We think that the tract as a whole was used for excavating purposes, even though only a part of it was actually being dug. Under prosecutor's reasoning, a landowner would be entitled to continue a previous, non-conforming use only on the precise spot where it was being done. We think that is not so, and was not the intention of the Legislature . . . . We think that the tract was a single unit and that it was put to a non-conforming use as a whole before the act of 1928 was passed.

The Dollar Value of the "Taking" Is Substantial

The *per curiam* opinion in the Appellate Division (App., Exh. 2) found that the operations of petitioner had clearly expanded since it had acquired the property in question. Gross sales of stone taken from Parcel A increased from $10,000 per year at the beginning of the business to approximately $1,500,000 in 1962. It also recited that the buildings at the site had a book value of approximately $254,000; that its machinery and equipment were valued at $1,795,000, and mobile equipment at $105,000. The dissenting opinion also took note of the large amount of investment and annual income involved.

The majority opinion of the Court of Appeals (App., Exh. 1) affirmed on the opinion of the Appellate Division and stated that the petitioner offered no proof (1) as to the financial loss it may suffer; (2) or as to the value of the land in Parcels B and C which, the court held, are apparently good residential building lots of substantial value (although fronting on a railroad right of way) or (3) that the parcels in question are more valuable for quarrying than they are for sale as residential lots.

There is evidence in the Record, as noted in both dissents in the lower courts and the majority opinion in the Appellate Division that the business represented an investment of over $2,000,000, with annual gross sales of over $1,500,000. The ordinance deprived the petitioner of the right of using the 47 acres from which it could expect to obtain at a minimum the same income it was enjoying from quarrying and crushing the rock from the same vein north of the tracks. The Court of Appeals should have taken notice that the income of the 35 acres since quarrying operations began was $17,283,662.45 (Record, Exh. 20) through 1962, and at least that amount was anticipated by Dolomite from the larger track "B", as indicated by the heavy investment in machinery and equipment.

Again, the dissenting opinion of Judge Burke, in which two other judges concurred, stated (App., Exh. 1), "It allows the destruction of petitioner's business, representing an investment of over $2,000,000.00, with annual gross sales over $1,000,000.00, in the name of the vaguest notions of public welfare." The dissent states ". . . the court sanctions an unconstitutional confiscation of petitioner's property . . . ."

It is a necessary conclusion from the evidence that it could not realize an income of $1,000,000 to $1,500,000 per year from 47 acres of land sold for building lots. It is also a necessary inference that the parcels in question are more valuable for quarrying than they are for sale as residential lots adjoining railroad tracks.

The Court of Appeals' findings are not only incorrect in view of the proof offered, but likewise raise the untenable conclusion that the 47 acres of land sold for building lots could produce up to $1,500,000 worth of gross income year after year, as the parcel north of the tracks is now doing, increasing gradually over a period lasting more than 35 years.

The New York state courts' criteria for evaluating whether a zoning action constitutes a regulation or a deprivation was set forth in *People v. Miller*, 304 N.Y. 105, 106 N.E.2d 34 (1952), and discussed at length in *Town of Hempstead v. Romano*, 226 N.Y.S.2d 291 (1962), where a junk yard became a non-conforming use under an ordinance providing for a three-year phase-out of such use: The court noted that this rule placed "its emphasis upon pecuniary and economic loss" and quoted *People v. Miller, supra:*

> "The destruction of substantial businesses or structures developed or built prior to the adoption of a zoning ordinance is not deemed to be balanced or justified by the advantage to the public, in terms of more complete and effective zoning, accruing from the cessation of such uses (*Id.* at p. 108, 106 N.E.2d p. 35.)"

The Court continued:

> What remains after an analysis of all the opinions is the fact that the majority followed *People v. Miller* in its test of pecuniary and economic loss for the validity of abolition of nonconforming uses whether immediately or by the invocation of an amortization period and reversal was required solely to complete the record with reference to factors relevant to such loss.
>
> Viewed in that light, it is significant to note that upon the rehearing in *Harbison* at Special Term, the court analyzed the evidence bearing upon the economic factors mentioned in the Court of Appeals order on remand, and concluded:
>
> "It therefore appears that the resultant injury to the petitioners is of a substantial nature and that the ordinance is unconstitutional as applied to the particular facts of this case. (*Matter of Harbison v. City of Buffalo*, Supreme Court, Erie County, per Fisher, J., unreported opinion dated 9/26/58.)"
>
> . . . .
>
> As a matter of fact, application of the ordinance [to the junk yard] would be tantamount to terminating the business of the defendants without compensation.
>
> [pp. 292-94]

The Appellate Division and the Court of Appeals Did Not Have Jurisdiction To Reverse the First Order of the Court of Original Jurisdiction Dated July 10, 1962

This action was commenced by a Petition of Dolomite to the Supreme Court of the State of New York, verified on February 25, 1963. The decision thereon (App., Exh. 4) of Justice Gabrielli included the following findings and conclusions:

> It is apparent that the operations of the petitioner, in so far as they relate to the land contained in the Industrial "E" zone [all of Parcel B; see f. 253], were permissable [sic] under the provisions of the Zoning Ordinance of 1948 [f. 254].
>
> . . . .
>
> The provisions of the Zoning Ordinance of 1948 . . . would seem to allow operations of the character generally described in the present application [for issuance of a permit under the Excavation Ordinance of 1950] [f. 267].
>
> We are, therefore, to decide whether or not the respondents [Appellees] have improperly denied petitioner's request for a permit and cancellation of the stop-work order [f. 268].

Other relevant passages of the decision as to Parcel B are at ff. 270-273. The court then concluded (ff. 279-280) as to Parcel B:

> As already indicated, there are no facts upon which it can be stated that the regulations of and determination made under the Excavations Ordinance, are reasonable or legal.
>
> This court, therefore, concludes that:
>
> 1. The matter, insofar as it applies to the prayer for relief directed to the property described in Exhibit "B" attached to the petition (and set forth in paragraph "2" of the petition), is remitted to the Town Board for a full and complete consideration of the application in which the petitioner shall be

> afforded an opportunity to be heard and present evidence; and for the making of findings which are susceptible to review, as to the sufficiency of the evidence, which should be done forthwith; and

No appeal was taken from this decision of the court of original jurisdiction, and Appellant here contends that as to Parcel B, said order is now final, conclusive and binding. Said order adjudged Appellant's use of Parcel B to be a use permitted under the 1948 Zoning Ordinance, leaving open only the question of the application of the Excavations Ordinance of 1950 insofar as it provided for the issuance of excavation permits.

The Excavations Ordinance's (App., Exh. 6) "Purpose" clause recites:

> It is the purpose of this ordinance to regulate . . . stone quarries . . . and prohibiting the use of any lands . . . for the aforesaid purposes [stone quarries] which do not comply with such regulations.

The authority conferred by this regulation is ministerial in nature, and the court of original jurisdiction remanded the Parcel B application not for the purpose of making findings of conforming or non-conforming use – but for "full and complete consideration of petitioner's application" under the Excavations Ordinance for Parcel B quarrying – which use the court had already determined to be a permitted use under the 1948 Zoning Ordinance, and from which determination there has not to this day been an appeal. The time period for filing such an appeal has, of course, long since expired.

Subsequently, by order dated March 26, 1964 (App., Exh. 3), the same lower Supreme Court Justice found that Dolomite was vested with a pre-existing, non-conforming use to quarry Parcel C, and that as to Parcel B, besides being a permitted use under the 1948 Zoning Ordinance (ff. 4 & 5), it also had established a pre-existing use which said ordinance could not affect. The court ordered, in part:

. . . .

ORDERED AND ADJUDGED, that the Town Board promptly act upon the said applications of petitioner, all in accordance with the *opinions* made and filed by the Court herein, and it is further

ORDERED AND ADJUDGED, that the *orders* herein are without prejudice to the right of petitioner to contest the applicability of the said excavation ordinance to it and the right to contest its constitutionality in general and in its application in particular to the applicant . . .

[ff. 17-18, emphasis added].

This is the order from which appeal was taken and which was reversed, and upon which the case is before this Court today. Even – arguendo – if the Appellant did not, in fact, establish a prior, non-conforming use of its property, the ultimate fact has been finally adjudicated that Dolomite had a permitted use as to Parcel B. (See 65 Harv. L. Rev. 818, 825 fn. 36, 835 fn. 115.) The question of "permitted use" was not before the lower appellate courts and they had no jurisdiction to reverse an order to the extent it was predicated on a decision from which no appeal was taken. Appellees here argued below that no issue as to Parcel B was presented to Justice Gabrielli in the second hearing and that his order insofar as it affected Parcel B was improper. That judgment had already vested and the doctrine of *res judicata* is applicable. This Court said in *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915):

> Its right so to do having been determined by a court of competent jurisdiction, the decree was binding between the parties or their privies in any subsequent case in which the same right was directly or collaterally involved. For "*even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified*". Southern Pacific Co. v. United States,

168 U.S. 48, 49. So also it was held in Forsyth v. Hammond (166 U.S. 518), that "though the form and the causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions." [*Hartford, supra,* pp. 673-74, emphasis in original.]

Respectfully submitted,

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APPENDIX

Appendix (Exhibit 1) Majority and Dissenting Opinions of the Court of Appeals

OPINION OF STATE OF NEW YORK COURT OF APPEALS

In the Matter of

DOLOMITE PRODUCTS COMPANY, INC.,
Appellant,

v.

FRANK F. KIPERS et al.,
Constituting the Town Board of the
Town of Gates,
Respondents.

Decided March 2, 1967

MEMORANDUM. The order should be affirmed, with costs, upon the opinion at the Appellate Division. As that opinion demonstrates, the record makes it clear that the appellant carried on no quarrying operations in parcels B and C since it acquired those properties more than 40 years ago. And, contrary to the intimations in the dissenting opinion, the appellant, as the Appellate Division pointed out, offered no proof either (1) "as to the financial loss it may suffer" (23 A D 2d, p. 342); (2) or "as to the value of the land in parcels B and C which * * * are apparently good residential building lots of substantial value which can be realized by [appellant] if its operations are limited to parcel A" (23 A D 2d, p. 342); or even (3) that "the parcels in question are more valuable for quarrying than they are for sale as residential lots" (23 A D 2d, p. 343).

BURKE, J. (dissenting). Today's holding by this court is profoundly disturbing. Under the impression that it ushers in a new day for "sound, wise and adequate municipal planning," the court sanctions an unconstitutional confiscation of petitioner's property, under the authority of a zoning ordinance enacted only *after* petitioner had already established

its nonconforming use of the property in question. It allows the destruction of petitioner's business, representing an investment of over two million dollars, with annual gross sales over one million dollars, in the name of the vaguest notions of public welfare. In the face of petitioner's demonstrated willingness to submit to reasonable regulation and with not the slightest showing of any hazard to public health or welfare, the court places its imprimatur upon a zoning ordinance enacted in desperate haste by the Town Board of Gates in a last ditch effort to prevent petitioner's continued use of its property for the purposes to which it has been devoted for the last 35 years.

The record reveals that petitioner in 1925 purchased and by a single conveyance took title to this 82-acre parcel (the Bonnett Farm) in the Town of Gates for quarrying purposes. The parcel is bisected by a railroad right of way, with 35 acres north of the right of way and 47 south, but petitioner has a farm crossing across the tracks and since its purchase of the property has utilized land and improvements on both sides of the right of way in connection with its quarrying operations, although commercial extraction of rock has so far taken place only to the north of the tracks. In 1948 the town adopted a zoning ordinance under which the southernmost portion of the parcel (a 175-foot strip, herein referred to as "Parcel C") was designated for residential use and the remainder of the property south of the tracks (Parcel B) was zoned "Industrial E", a classification allowing use of the land for quarrying. The land north of the tracks (Parcel A) was likewise designated "Industrial E". These classifications remained in effect until early 1963, when, in response to the initiation of certain activities preparatory to quarrying upon Parcel B by petitioner, the town amended its zoning ordinance to prohibit all quarrying south of the railroad. This amended ordinance did not become effective until after petitioner had (1) maintained on that part of the Bonnett Farm now designated Parcel C for as long as it owned the property a dynamite magazine used in connection with its quarrying

operations, (2) taken numerous test borings south of the tracks, (3) begun stripping topsoil in Parcel B in preparation for blasting rock, and (4) commenced construction of a berm on the southeast corner of the property to shield from its operations the few residences anywhere near enough to be affected. This ordinance was adopted, apparently, only after the Town Board realized that it had no legal basis for denying petitioner the excavation permit it was entitled to under the town's 1950 excavation ordinance and the 1948 zoning ordinance.

The majority opinion in the Appellate Division, upon which the court today relies, treats *New York Trap Rock Corp. v. Town of Clarkstown*, (3 N Y 2d 844) as dispositive of the case, though this conclusion is premised upon its inaccurate characterization of *Trap Rock* as "quite analogous to the case at bar." Such a comparison is incorrect, for in *Trap Rock* it was conceded by the property owner that there was *no* prior nonconforming use of the parcel in question. Its contention was that, because of the quarrying carried on by the common owner on an earlier purchased, larger parcel across the road from the parcel in question, it should have been allowed to "tack" the smaller parcel onto the larger for purposes of establishing a nonconforming use. This is far different from the instant case, wherein petitioner's activities over its entire property have established its use of the single tract for quarrying purposes. We reject the notion that, because a railroad right of way crosses the property and because various parts of the property have received different zoning treatment, it somehow became three separate parcels. The land was purchased and has been used as a single entity for as long as plaintiff has held title to it. Petitioner has not extracted rock from its entire area, but this is not the way quarrying operations are conducted. As Mr. Justice Del Vecchio so aptly observed in his dissenting opinion below, "the nature of the activity in which petitioner is engaged is

such that it cannot be carried on simultaneously at every point on the premises" (23 A D 2d, p. 344). Petitioner has, as the property owner in *Trap Rock* conceded it had not, used the single parcel in question for its quarrying operation.

The claimed reliance of the majority in the Appellate Division upon our decision in *Town of Somers v. Camarco* (308 N.Y. 537) is similarly disingenuous. In *Camarco* this court clearly rejected the view that, in order to establish a nonconforming use of property for quarrying, its entire area must have been quarried. Even the dissenters in *Camarco* did not suggest that *substantial* quarrying operations conducted on a single parcel would be insufficient to establish a nonconforming use as to the entire parcel.

No one seriously urges that the town may not through reasonable regulation control the manner in which petitioner quarries its land (see *Town of Hempstead v. Goldblatt*, 9 N Y 2d 101, affd. 369 U.S. 590). The town's right to take such a measure was recognized by Justice Del Vecchio in his dissent below. The 1948 ordinance created a buffer zone 175 feet deep on petitioner's own land between its quarrying operations and the approaching residential development to the south.[1] Where we differ with the majority here and below is on the question of whether the town's action under the ordinance of 1963 in barring *any and all use* of the land south of the railroad for quarrying was *reasonable* in the light of petitioner's prior nonconforming use of this property. We are convinced that the 1963 ordinance was so unreasonable as to amount to an unconstitutional taking. It gives petitioner but seven or eight years in which to recoup its substantial investment in improvements upon the land, undertaken, at least in part, in reliance upon Parcel B's being zoned for quarrying under

[1] The record discloses that petitioner has purchased substantial acreage south of the parcel here in question to serve as a buffer zone between its operations and the surrounding community.

the 1948 ordinance. After petitioner has exhausted its rock supply to the north of the tracks it will have to terminate its Gates operation. It cannot simply move its operation to another part of town. (Compare *Matter of Harbison v. City of Buffalo*, 4 N Y 2d 553, where on our remand we directed that Special Term determine *inter alia* the value and condition of the improvements upon petitioners' property and the feasibility of their relocating so that a proper determination of the reasonableness of the city's actions might be made.) The ordinance of 1963 bars any use of this land, after the rock in Parcel A is depleted, for the purposes for which petitioner purchased it, improved it with buildings and machinery, and for 40 years has used it.

It is a mechanical jurisprudence which would equate a municipality's right to put an end to the keeping of pigeons as a hobby (see *People v. Miller*, 304 N.Y. 105) with the Town of Gates' destruction of petitioner's substantial property interest in its quarrying business, which would hold that the same respect to be accorded the enactments of a municipal legislature where health and safety considerations are so obvious must be accorded ordinances where the public purpose to be served by their drastic invocation of the police power is not at all so obvious. This court has never in the past given such *carte blanche* to municipal governments in the field of zoning. (See, e.g., *Matter of Harbison v. City of Buffalo, supra; Dowsey v. Village of Kensington*, 257 N. Y. 221; *Vernon Park Realty v. City of Mount Vernon*, 307 N. Y. 493.) Our cases are clear that in order to constitute a valid limitation on the use of property the restrictions imposed must *reasonably serve some proper zoning purpose*, and what is *reasonable* can be determined at most through weighing the injury to the property owner against the public benefit sought to be achieved. (See *Matter of Harbison v. City of Buffalo, supra*, p. 559; *Town of Somers v. Camarco, supra*, pp. 540-541.) Any other course, it always seemed clear, would run afoul of constitutional limitations upon the exercise of the police power, as

the decisions of the United States Supreme Court have so amply demonstrated. (See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595-596, *supra.*). As the Supreme Court said in *Lawton v. Steele* (152 U. S. 133, quoted with approval in *Goldblatt*): "To justify the State * * * interposing its authority in behalf of the public, it must appear, first, that the interests of the public * * * require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals" (p. 137).

Application of such a rule requires a case by case evaluation of the injury suffered and the public interest claimed to be advanced. Under such a rule, we do not see how the courts can be content with speculation as to some perhaps remote public good to be served by this challenged enactment. Indulgence of this sort has not been the practice of our courts, which must strive, mightily at times, to do justice to litigants, whether they be private citizens, business concerns or municipal corporations. Certain presumptions may be operative in favor of the third class of litigants, but in the face of clear proof to the contrary such presumptions vanish. Only under judicial scrutiny of this sort can constitutional safeguards against governmental excesses be maintained. This is the lesson of our history and we hesitate to think that it may be so easily forgotten today. Property rights are not to be sanctified, but they need not, and they should not, be so lightly regarded.

We would modify the order of the Appellate Division by reinstating that portion of the order of Special Term directing the Town Board to permit excavation by petitioner on Parcel B, subject to reasonable regulation.

Chief Judge Fuld and Judges Bergan, Breitel and Best[2] concur in memorandum; Judge Burke dissents in an opinion in which Judges Van Voorhis and Scileppi concur.

Order affirmed, etc.

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[2]Designated pursuant to section 2 of article VI of the State Constitution in place of Keating, J., disqualified.

Appendix (Exhibit 2) Majority and Dissenting Opinions of the Appellate Division, Supreme Court

OPINION OF THE APPELLATE DIVISION.

SUPREME COURT — APPELLATE DIVISION
FOURTH DEPARTMENT

In the Matter of the Application of
DOLOMITE PRODUCTS COMPANY, INC.,

Respondent,

—vs.—

FRANK F. KIPERS, COSTANZO CARUSO, NELSON DENNIS, WILLIAM FORBES and MARY MURRAY, constituting the Town Board of the Town of Gates, New York,

Appellant.

#306/1965

ARGUED: May 20, 1965
DECIDED: June 25, 1965

Present: HON. ALGER A. WILLIAMS,
Presiding Justice.

HON. EARLE C. BASTOW,
HON. HARRY D. GOLDMAN,
HON. FRANK DEL VECCHIO,
Associate Justices.

APPEAL by respondents (Town Board, from Order of Monroe Special Term, Gabrielli, J., ordering them to remove stop work order and to issue an excavation permit to petitioner.

Order entered March 30, 1964.

Appearances:

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OPINION

PER CURIAM:

Petitioner-respondent corporation was granted a declaration by Special Term that certain lands owned by it had acquired the status of a non-conforming use as respects rock quarrying purposes. Respondent corporation purchased the property during 1925. In these proceedings the land has been referred to as three parcels, designated A, B and C. Parcel A, which is located north of a railroad track which intersects the property, has been operated as a quarry since 1925. Various buildings were constructed and equipment installed and used in connection with the operation of parcel A. The development and use of the property as a quarry is a non-conforming use which was commenced prior to the adoption of the Town ordinance which prohibits the conduct of a quarrying operation in the area in which the property is located.

The land in parcels B and C, south of the tracks, after acquisition by respondent was used as farm lands and for nursery purposes. Since 1925 residential subdivisions have developed in the area south of these parcels and at the date of the application for the permits thousands of homeowners had come into the area and now reside in the vicinity.

Application was made by the respondent for the issuance of excavating and blasting permits for its property and the refusal of the Town to issue the permits as to parcels B and C is the subject of this proceeding. Respondent urges that it has a legal right to the issuance of the permits because it had acquired a vested right to continue the operation of its quarry by reason of its prior non-conforming use.

The record indicates that the operations of respondent have clearly expanded since it acquired the property in question. Gross sales of stone taken from parcel A increased from $10,000 per year at the beginning of the business to approximately $1,500,000 in 1962. Respondent further offered proof that the buildings at the site, located on parcel A, have a book value of approximately $254,000; that it has machinery equipment of approximately $1,795,000 and mobile equipment of $105,000. Respondent urges that to deny the permits would result in serious financial loss. One of respondent's principal officers testified that its present rate of production is approximately 4,000 tons per day and that at this rate it would have quarryable stone in parcel A, north of the tracks, which would bring it in production for a period of 7 to 8 years before being required to exploit the land south of the tracks. Respondent further presented proof that the only development of the area immediately south of the tracks in parcel B was the stripping of topsoil from a limited area south of the railroad right-of-way in 1949 and the making of some test drills in the stripped area

in 1962. Respondent further constructed a berm about 12 or 15 feet high on parcel C as a barrier to protect the residences surrounding parcel C from the effects of the blasting done in the quarrying process.

The principal issue involved in this appeal is whether the non-conforming use made of parcel A can be extended to parcels B and C so as to give these parcels the same non-conforming character which parcel A enjoys. It is clear from the record that no quarrying operations have been carried on in parcels B and C since the acquisition of these properties 40 years ago. Involved in this determination is the balancing of the interests between the economic loan which may be suffered by the respondent if the permits are denied and the protection of the homeowners in the residential areas immediately adjacent to the property in question. No direct proof has been offered by the respondent as to the financial loss it may suffer. The machinery and mobile equipment which can be moved or salvaged represent approximately 90 per cent of the book value of respondent's investment. No proof was offered as to the value of the land in parcels B and C which, from the exhibits, are apparently good residential building lots of substantial value which can be realized by respondent if its operations are limited to parcel A.

Respondent cites *Town of Somers* v. *Camarco,* 308 N.Y. 537 in support of its position. The fact situation there is distinguishable from the case at bar but we believe that the principle asserted by the court at pages 540-541 supports the denial of respondent's position. The court said:

> "The courts, in order to afford stability to property owners who do have existing nonconforming uses, have imposed the test of reasonableness upon such exercise of the police powers. Therefore broad general rules and

tests, such as expressed in People v. Miller (304 N.Y. 105), must always be considered in this context. In addition, the extent of the reasonable exercise of the police powers varies directly with the degree of the density of the population in the, city, town or village involved. * * * * * * A definition of reasonableness can not be made for all occasions, and must, of necessity, be considered anew in the light of each problem presented."

Respondent contends that the reason for purchasing parcels B and C was to work said parcels some time in the future as it is presently operating parcel A. It would be patently unfair to the homeowners who have built residences in the area to hold that the intention to quarry, not carried out over a 40-year period, is sufficient reason to enable respondent to tack on the non-conforming use of parcel A to parcels B and C. The test of the character of parcels B and C should be the use made of these parcels prior to the adoption of the zoning ordinance which now makes quarrying illegal without a permit. It is not consonant with progressive or contemporary planning to permit one to purchase a large parcel of real property, work thirty-five acres of it and do nothing for 40 years with the balance of forty-seven acres but, nevertheless, have the right some time in the distant future to make a non-conforming use of it in violation of an ordinance prohibiting it and to the great detriment of adjacent homeowners. Such a philosophy of planning could stunt or kill the growth of substantial areas of property surrounding the parcels in question, for abutting owners would be required to wait, as in the instant case, for decades to determine the use which could be made of the property. The principle to be applied to the issue before us is that enunciated in *New York Trap Rock Corp.* v. *Town of Clarkstown*, 1 A.D. 2d 890. The fact situa-

tion in that case is quite analagous to the case at bar. Property had been purchased in 1927 and thereafter a comprehensive zoning ordinance was adopted by the Town. At that time about 100 houses had been erected in the area. The parcel in question was suitable for residential purposes, as are the parcels B and C in the instant case. The court held at page 891 that "in view of the harm to the community inherent in the unlimited extension of such quarrying operations as respondent's, the fact that parcel 17 is worth considerably more for quarrying than for residential purposes does not invalidate the ordinance". It is significant that no effort was made by respondent to prove that the parcels in question are more valuable for quarrying than they are for sale as residential lots.

There are residences as close as 110 feet to parcel C. A very large part of the area adjacent to parcel C has in recent years been substantially developed by homeowners. There is no doubt that the highest and best use of the surrounding property is for residential purposes. Upon the facts contained in this record, applying the doctrine of reasonableness, the refusal of the Town to issue the excavation and blasting permits was a reasonable exercise of its police powers and should be upheld. The conclusion of the Trial Court that parcels B and C were in the category of a nonconforming use is contrary to the weight of the evidence.

The order should be reversed and the motion denied.

Williams, P.J., Bastow and Goldman, J.J. concur.

DelVecchio, J., dissents in a separate opinion.

DISSENTING OPINION

DEL VECCHIO, J.

I agree with the conclusions of Special Term that petitioner has a nonconforming use as to Parcels B and C. I conclude, however, that the nonconforming use should be continued in area B subject to reasonable regulations and that it was properly extinguished by ordinance in area C. (See *Matter of Harbison* v. *Buffalo*, 4 N Y 2d 553; *Hempstead* v. *Goldblatt*, 9 N Y 2d 101, affd. 369 U. S. 590.)

The record discloses that in 1925 petitioner acquired for quarrying purposes an 82 acre single parcel of land in the Town of Gates, artificially divided by a railroad right of way, of which 35 acres were located north of the railroad and 47 acres (designated in this proceeding as Parcels B and C) were located south of it. At that time the surrounding property was mainly farm land. In 1948 the Town adopted a zoning ordinance which zoned area B Industrial E, in which quarrying was permitted, and zoned area C Residential. In 1950 it adopted an excavation ordinance obviously directed solely at petitioner, regulating the operation of stone quarries. It is undisputed that between 1925 and 1962 petitioner conducted substantial quarrying operations in the 35 acre area north of the railroad and that area was being exhausted so that it was becoming necessary to commence quarrying in parcel B, south of the railroad, and petitioner started to drill rock in such area in 1962. This caused the Town to issue a stop-work order directing petitioner to cease any activity south of the tracks without first securing a permit. Petitioner's application for such permit for areas B and C and for cancellation of the stop-work order was denied on February 1, 1963. Sometime around the date of the application and denial, the Town adopted a

new zoning ordinance which according to the answer on or about January 25, 1963 rezoned area B as M2 Manufacturing, in which zone quarrying is not a permitted use. The zoning map, which is not part of the record and was not before the court, shows that in April 1963 the zoning ordinance was again changed and made all area south of the railroad residential. It also appears that in 1930, within a few years after acquiring the 82 acre plot, petitioner began discussions with representatives of the railroad and with a public official regarding the possibility of constructing a tunnel under the railroad to obtain adequate access to that portion of the plot which lay south of the tracks. In 1949 it stripped some of the top soil from that area and also constructed a berm along the south line of the 82 acre tract. The evidence established that petitioner did about $1,500,000 worth of business in 1962 and that it has over $2,300,000 invested in land, buildings, machinery, trucks, automobiles and mobile equipment.

I conclude that the operations carried on north of the tracks constituted an appropriation of the entire tract (including B and C) to quarrying use. As this court said in *Matter of Fairmeadows Mobile Village* v. *Shaw*, 16 A D 2d 137, in determining whether the inception of a nonconforming use on a limited part of a plot constitutes a pre-emption of the entirety of the plot for such use, "The criterion is whether the nature of the incipient nonconforming use, in the light of the character and adaptability to such use of the entire parcel manifestly implies an appropriation of the entirety to such use prior to the adoption of the restrictive ordinance." (p. 142). The nature of the activity in which petitioner is engaged is such that it cannot be carried on simultaneously at every point on the premises. However,

its conduct in carrying on substantial, and constantly progressing excavating activities in part of the tract, its long-time concern with the construction of a tunnel under the railroad tracks so as to make possible the removal of materials quarried south of the tracks to the processing and storage facilities located north of the tracks and its occasional engagement south of the tracks in works preliminary to actual quarrying manifest an appropriation of the entire 82 acre plot to the operation of quarrying. In *Lamb* v. *McKee*, 10 N. J. Misc. 649, 160 A. 563, where one acre of a ten acre tract was being excavated for sand and gravel when zoning ordinance was enacted, it was held that the nonconforming use extended to the whole ten acre parcel as a unit. The *Lamb* case was recently approved in *Moore* v. *Bridgewater*, 69 N.J. Super. 1; 173 A. 2d 430; see also *County of DuPage* v. *Elmhurst-Chicago Stone Co.*, 18 Ill. 2d 479, 165 N.E. 310; *Hawkins* v. *Talbot*, 248 Minn. 549, 80 N.W. 2d 863. In the case of a quarry, it is not essential that a nonconforming use exercised at the time a zoning ordinance is enacted should have embraced an entire tract, by excavation in every part of the tract, in order to entitle the owner to subsequently employ it all for the use. Some activity on only a part is sufficient to create a nonconforming use for the whole tract. (See *Town of Somers* v. *Camarco*, 308 N. Y. 537.) Accordingly, insofar as the 1963 ordinance excludes quarrying from uses permitted in areas B and C, petitioner has a prior nonconforming use.

In the absence of a provision in the zoning ordinance permitting such uses to continue, I conclude that the Town may validly proscribe and terminate such nonconforming use in

Appendix (Exhibit 3) Decision of the Supreme Court, Special Term, dated March 7, 1964, and Order thereon dated March 26, 1964

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

In the Matter of the Application of
DOLOMITE PRODUCTS CO., INC., Petitioner,

against

FRANK F. KIPERS, COSTANZO CARUSO, NELSON DENNIS, WILLIAM FORBES, and MARY MURRAY, constituting the Town Board of the Town of Gates, New York, Respondents.

APPEARANCES: Harris, Beach, Keating, Wilcox, Dale & Linowitz, Esqs., Wiedman & Wiedman, Esqs., Attorneys for Petitioner.

Neil F. Bubel, Esq., Attorney for Respondents.

[March 7, 1964]

DECISION

GABRIELLI, J.

In this Article 78 proceeding, the matter was returned to Special Term to take proof relative to the status of certain lands, as set forth in paragraph "3" of the petition and described in Exhibit "C" attached hereto. Because of issues created at the time the matter was first before Special Term and of the impossibility of deciding these issues upon the pleadings and exhibits alone, it became necessary to hear the evidence of the petitioner and the respondents.

The sole question presently before the court is whether this property is to be considered as having attached to it, the status of a "non-conforming use", as it relates to the Zoning Ordinance of 1948, which placed the lands in a residential zone while the remainder of the original tract was zoned industrial.

The order of Special Term (39 Misc.2d 627), provided that the matter be returned for the purpose of taking "proof and for the presentation of evidence as to (a) what use this particular land was put to prior hereto, (b) as to the character of the neighborhood at the present time and at all times prior hereto, (c) as to the evidenced intent of the petitioner as to the use of this land, when the same was purchased, (d) the character, scope and area of the operations of the petitioner, as well as all other facts which would permit a determination to be made as to whether this land is susceptible to the theory of law that there was and is a proper expansion or extension of a non-conforming use.

The court has found that the petitioner purchased its first lands from one Becker in 1922 for use in its stone quarrying business; and that in 1925 it purchased the premises in question. It is conceded that the petitioner conducted its operations on part of the entire tract purchased, since the date of the purchase of the whole tract.

When, in 1948, the respondent adopted a Zoning Ordinance, it placed the questioned parcel in a residential zone. This parcel is 1,520 feet in length and 175 feet in width.

On February 13, 1950 the respondent Town adopted an Excavations Ordinance which regulated the procedures to be followed in obtaining a permit to excavate. The petitioner has professed its willingness and ability to comply with the requirements thereof, and had previously made application for such a permit.

It further appears that the petitioner's rate of production was constantly increasing, prior to its purchase of the questioned lands in 1925 and in order to provide for present and future needs, it then contracted for and purchased the property known as the Bennett farm. This consisted of 34½ acres to the north of the New York Central Railroad right of way, as well as some 47 acres to the south thereof. It is from this latter parcel that the questioned area was carved out and placed in a residential zone.

It further appears that the purchase of the Bennett farm was made for the specific purpose of obtaining adequate reserves of Dolomite rock for future operations. In addition, the testimony revealed that the portion to the north of the railroad right of way (34½ acre parcel) has been nearly exhausted.

Of further interest, it was shown that, at the time of the purchase of the whole tract, there were only isolated farm houses in the general vicinity. Since that time there has been some building of homes but no where in close proximity to the questioned lands. In addition, the petitioner had constructed a high berm for everyone's protection and convenience.

Although not controlling, it further appears that the petitioner has a large and substantial investment in land and buildings.

There was also evidence that, as part of its general operations, the petitioner had used the questioned lands for storage of dynamite and had begun preparations for its general use; and a denial of its use would presently hinder its operations and in time, cause it to cease altogether. It would not only produce serious financial harm; but would, in the end, destroy the business.

Although not every expansion or extension of certain operations will be permitted, the view has been taken that it is not essential that a non-conforming use exercised at the time a zoning ordinance is enacted should embrace an entire tract in order to entitle an owner to subsequently employ it all for the use. To so hold would deprive owners of the use of their property as effectively as if an ordinance was so drawn as to be completely prohibitive of all use. (*8 McQuillin, Mun. Corp. (3rd Edition)*, Sec. 25.208, p. 521; *DeFelice v. Zoning Bd. of Appeals*, 130 Conn. 156; *Village of Ossining v. Meredith*, 190 Misc. 142.

In commenting on, and approving this theory, the Court of Appeals in *Somers v. Camarco*, 308 N.Y. 537, said, "The

courts, in order to afford stability to property owners who do have existing non-conforming uses, have imposed the test of reasonableness upon such exercise of the police powers. Therefore, broad general rules and tests, such as expressed in *People v. Miller*, 304 N.Y. 105, 106 N.E.2d 34, must always be considered in this context. . . . A definition of reasonableness cannot be made for all occasions, and must, of necessity, be considered anew in the light of each problem presented."

It is quite obvious that an owner intending to carry on a quarrying operation acquires more land than he thinks he will need so that he will not be a source of nuisance to his neighbors. It must be assumed that for practical and economical reasons he must begin operations at one given point and continue from there to a point on his land where his natural resource ends or at his boundary line. For the same reasons, it is not feasible for him to quarry at different locations at the same time. To be also taken into consideration is the fact that the prior non-conforming use was not the ordinary "run of the mill" variety, but that here it involved a "diminishing asset".

Upon all of the evidence, this court concludes that the land in question is in the category of a non-conforming use. The sole question remaining is the effect of the Zoning Ordinance of 1948.

It has always been the law of this state that non-conforming uses which have been in existence when a zoning ordinance is enacted, are constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance. *Ortenberg v. Bales*, 250 N.Y. 598, *Mat. of Caponi v. Walsh*, 228 A.D. 86; *Mat. of Pelham v. Switzer*, 130 Misc. 545.

There is no provision in the zoning ordinance that non-conforming uses could be continued. In modern zoning ordinances, this is provided for and there then usually follows a series of reasonable and non-confiscatory regulations and provisions touching upon the protection of the public from

nuisances, etc. The zoning ordinance here before us is silent on this subject.

Zoning ordinances and regulations almost always impose substantial loss or hardship upon a landowner, particularly where prospective use or the continuation of existing and permitted uses, is prohibited. This is a loss that is much greater than that sustained by reason of a prospective use *restriction.*

The destruction of substantial businesses developed prior to the adoption of a zoning ordinance is not to be deemed to be balanced or justified by the advantages to the public, in terms of more complete and effective zoning.

This does not mean, however, that the municipal authorities cannot regulate the use of such land provided the regulations are not confiscatory and unreasonable.

Thus, in the present case, any use of the area in question, is to be given no greater status than the area actually in use and it is, therefore, subject to further regulation by the Town so long as such regulatory provisions are reasonable and within the police power, to wit: the obtaining of an excavating permit, after a hearing before the Town Board at which proof should be taken.

It would, therefore, appear that an excavation permit should be granted (and the stop-work order cancelled) provided that all reasonable requirements of the Excavation Ordinance of 1950 are complied with. This matter is, therefore, remitted to the Town Board for the issuance of a permit, upon compliance by the petitioner, of all the conditions and prerequisites of the Excavation Ordinance of 1950.

Submit order.

Dated: March 7, 1964

/s/ Domenick L. Gabrielli
Supreme Court Justice

[Exhibit No. 3, cont'd]

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Monroe at the Court House in the City of Rochester on the 7th day of October, 1963.

PRESENT: HONORABLE Domenick L. Gabrielli

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

In the Matter of the Application of
DOLOMITE PRODUCTS CO., INC.,
Petitioner,

v.

INDEX NO.
2328/63

FRANK F. KIPERS, COSTANZO CARUSO, NELSON DENIS, WILLIAM FORBES and MARY MURRAY, constituting the Town Board of the Town of Gates, New York,
Respondents.

A motion having regularly come on before this Court for an order rescinding and nullifying purported stop work orders of respondents served upon petitioner, and directing respondents to approve two applications for excavating permits, one relating to premises described in Exhibit B attached to the petition, and the other relating to premises described in Exhibit C attached to the petition, and upon the hearing this Court having found and determined that the premises described in Exhibit B were included in the Industrial "E" zone of the 1948 zoning ordinance of the Town of Gates and that rock quarrying, rock crushing, and rock removal and the business thereof was a permitted use of the premises described in said Exhibit B, and that other land of the petitioner north of the New York Central right of way as shown on the maps annexed to the petition had

been consistently and actively used for rock quarrying, rock crushing, rock removal and the business thereof and operations pertinent thereto, including blasting, since 1920 and prior to the enactment of the 1948 zoning ordinance of the Town of Gates, and that the premises described in Exhibit C were zoned residential by the zoning ordinance of 1948 but that the Court could not on the papers before it determine the issue as to whether the premises described in Exhibit C, acquired by petitioner in 1925, constituted a pre-existing non-conforming use of which petitioner has the benefit and whether it had always been the intent of the petitioner to use the entire land owned by it, including the premises described respectively in Exhibits B and C, as well as the premises of the petitioner north of the New York Central right of way, for rock quarrying, rock crushing, rock removal and the business thereof and operations pertinent thereto, including blasting, and the Court heretofore made an order dated August 5, 1963 and entered on August 6, 1963 which among other things, remitted the application so far as it referred to the premises described in Exhibit B to the Town Board of the Town of Gates with direction to give full and complete consideration to petitioner's applications and to make findings, and said order with respect to the application so far as it referred to the premises described in Exhibit C directed the taking of testimony for the determination of the issues with respect to Exhibit C as enumerated in said order dated August 5, 1963 and the said order having further directed that determination of the relief asked for be continued pending the completion of the taking of testimony by this Court, and the completion of the hearings by the Town Board of the Town of Gates, and a trial of the aforesaid issues having been held before this Court on October 7, 1963 and at said trial, Frederick Wiedman, Jr. and Charles S. Wilcox, of counsel, appearing for petitioner, and Neil F. Bubel, of counsel, appearing for Respondents, and the Court after due deliberation having found and determined that the premises described in Exhibit C as well as Exhibit B constitute a pre-existing non-conforming use of which peti-

tioner has the benefit for rock quarrying, rock crushing, rock and stone removal and the business thereof and operations pertinent thereto, including blasting, and that it had always been the intent of the petitioner to use the entire land owned by it, including the premises described in Exhibits B and C as well as the premises of petitioner north of the New York Central right of way for the same purpose, and that this was known or should have been known to all involved, and furthermore, the Court having found and determined, among other things, that the petitioner prior to 1925 was engaged in the business of rock quarrying, rock crushing, rock removal and the business thereof, and operations pertinent thereto, including blasting, on premises known as the Becker farm south of Buffalo Road and that prior to 1925 its rate of production was constantly increasing, and that in 1925 it acquired the Bonnet farm, consisting of 34½ acres adjacent to the Becker farm premises and north of and adjacent to the New York Central right of way, and 47 acres south of and adjacent to the New York Central right of way which 47 acre parcel comprises the premises described in Exhibits B and C, and that said Bonnet farm was acquired by petitioner in 1925 to provide for its present and future needs and for the specific purpose of obtaining adequate reserves of rock for future operations, and that at the time of purchase in 1925 there were only isolated farm houses in the vicinity and as of the time of the hearing, there had been no homes built in close proximity to said premises, and that petitioner had used the premises described in Exhibits B and C for the storage of dynamite and had begun preparations for its general use, and that petitioner has nearly exhausted the usable rock in the premises owned by it north of the New York Central right of way and that petitioner has a large and substantial investment in land, buildings and equipment on said premises, and that denial of the use of the premises described in Exhibits B and C would be confiscatory in that it would presently hinder petitioner's operations, and in time cause them to cease altogether, not only producing serious financial harm, but ultimately destroying petitioner's business.

NOW, upon reading and filing the petition herein verified February 25, 1963, the notice of application, the reply of the petitioner verified March 29, 1963, the affidavit of Robert C. Odenbach duly sworn to March 29, 1963 together with the exhibits annexed to the aforesaid petition, reply and affidavit, all with due proof of service thereof upon respondents and all in support of the application, and the answer of respondents verified March 13, 1963, the affidavit of Frank F. Kipers duly sworn to March 12, 1963, the affidavit of Everett B. Russel duly sworn to March 12, 1963 and the Exhibits annexed to said answer and affidavits, with due proof of service thereof upon petitioner, all in opposition thereto, and the application having come on to be heard before this Court on October 7, 1963 and after hearing Frederick Wiedman, Jr., Esq., and Harris, Beach, Wilcox, Dale and Linowitz, by Charles S. Wilcox of counsel in support of petition, and Neil F. Bubel, Esq. in opposition thereto and upon the decisions of this Court dated March 7, 1964 and July 10, 1963 and the order of this Court dated August 5, 1963,

NOW, upon motion of Harris, Beach, Wilcox, Dale and Linowitz and Frederick Wiedman, Jr., attorneys for petitioner, it is

ORDERED AND ADJUDGED, that the aforesaid premises of petitioner described in Exhibits B and C attached to the petition as well as the premises of petitioner north of the New York Central right of way were used by petitioner in the business of quarrying, rock crushing, rock removal and the business thereof and operations pertinent thereto, including blasting, prior to the enactment of the zoning ordinance of the Town of Gates in 1948 and have been consistently used for such purpose and as such are pre-existing non-conforming uses which are entitled to continue, subject to compliance with the regulatory provisions of the excavation ordinance of the Town of Gates to the extent that the same are reasonable and non-confiscatory in their application to petitioner, and it is further

ORDERED AND ADJUDGED, that the excavation permit be granted pursuant to the applications, copies of which are attached to the petition as Exhibits B and C, provided that the petitioner complies with all reasonable and non-confiscatory requirements of the said excavation ordinance, and it is further

ORDERED AND ADJUDGED, that the purported stop work order issued by the Town of Gates and served upon petitioner be and the same hereby is declared and determined to be null, void and of no effect, and it is further

ORDERED AND ADJUDGED, that this matter is remitted to the Town Board of the Town of Gates for the issuance of a permit, upon compliance of the petitioner, with all of the reasonable and non-confiscatory conditions and prerequisites of said excavation ordinance, and it is further

ORDERED AND ADJUDGED, that the Town Board promptly act upon the said applications of petitioner, all in accordance with the opinions made and filed by the Court herein, and it is further

ORDERED AND ADJUDGED, that the orders herein are without prejudice to the right of petitioner to contest the applicability of the said excavation ordinance to it and the right to contest its constitutionality in general and in its application in particular to the applicant, and it is further

ORDERED that a determination upon the application herein for an order directing the issuance of excavating permits be and the same is continued pending the decision of the Town Board of the Town of Gates of the matters herein remitted to it.

Dated: March 26, 1964

ENTER:

/s/ Domenick L. Gabrielli
J.S.C.

/s/ A. Gould Hatch
Clerk

Filed March 30, 1964
Monroe County Clerk's Office

Appendix (Exhibit 4) Decision of the Supreme Court, Special Term, dated July 10, 1963, and Order thereon dated August 5, 1963

ARTICLE 78 PROCEEDING FOR REVIEW OF STOP-WORK ORDERS AND TO DIRECT ISSUANCE OF PERMITS

APPEARANCES: Harris, Beach, Keating, Wilcox, Dale & Linowitz, Esqs.,
Wiedman & Wiedman, Esqs., Attorneys for Petitioner.

Neil F. Bubel, Esq., Attorney for Respondents.

DECISION

[July 10, 1963]

GABRIELLI, J.

The petitioner is and has been engaged in the business of stone quarrying since its incorporation in 1920. It further appears that since 1925, when it acquired the premises in question, the petitioner had conducted the business of crushing, blasting, quarrying and preparing for market, stone, rock and other substances. It is conceded that these operations were conducted on one parcel of the entire premises involved since the time the whole of the premises were purchased in 1925; but, there is serious dispute as to whether these operations had been conducted on the balance of the land involved.

In 1948, the respondent, Town of Gates, adopted a Zoning Ordinance. It is undisputed that the first-above-mentioned parcel and the parcel described in Exhibit "B" were then included in the "Industrial E" zone and that a second parcel was then made a part of the "Residential" zone.

The Zoning Ordinance provided, in part, that it was permissable, in such Industrial "E" district to engage in the business of "rock crushing, sand and gravel pit." (Sec. 60, subd 19); as well as "any industrial process emitting dust, odor, gas, fumes, noise or vibration when comparable in character to or not in aggregate amount exceeding that of

any use specified above in this subdvision." (Sec. 60, subd 22). It is apparent that the operations of the petitioner, in so far as they relate to the land contained in the Industrial "E" zone, were permissible under the provisions of the Zoning Ordinance of 1948.

In addition it is clear, and tacitly admitted, that the operations of the petitioner on the lands owned by it in the Industrial "E" district to the north of the New York Central Railroad lands had been consistently conducted in the same fashion as at the time of the application, since 1925; and, therefore, were in the nature of a non-conforming use. From the records before the court, there can be no doubt about this.

In February of 1950, the respondents proceeded to enact an Excavations Ordinance which required an applicant to obtain a permit and approval to conduct soil stripping, blasting and excavation work.

Sometime prior to January 25, 1963, the respondents served a "stop-work order" upon the petitioner, directing it to cease quarrying operations on lands south of the New York Central Railroad altogether, because of its failure to obtain an excavation permit. On January 25, 1963, the petitioner (without conceding the validity of this ordinance) simultaneously made two applications for excavation permits, one for each of the two parcels involved.

The applications were not approved by the respondents. There is no evidence of any reason therefor nor what was considered by the respondents in not approving the applications. The record before the court in this regard, is barren of any facts, which would support the failure to approve the applications.

The petitioner contends (1) that the Excavations Ordinance is invalid in that the notice of hearing regarding the adoption of the ordinance was improperly published and that (2) in any event, even if the ordinance is declared to be valid it had been conducting its operations prior to the enactment of either the Zoning Ordinance or the Excavations Ordinance and hence was entitled to the protection of a non-conforming use.

The respondents claim that (1) both of the premises described in Exhibits "B" and "C" of the petition are subject to the provisions of the Excavations Ordinance and that (2) these premises were never used for quarrying purposes, are not a part of an entire tract, and in fact these premises were always used for farming and nursery purposes by petitioner's tenants.

The petitioner seeks an order directing the cancellation and recission of the "stop-work order" and for a direction that the applications for excavation permits be approved and granted.

We shall first direct our attention to the claimed invalidity of the enactment of the Excavations Ordinance. The petitioner contends that the notice of public hearing prior to its adoption was improper and did not meet the requirements of the Town Law (Sec. 133), and in particular that the notice of hearing did not have included therein, the whole of the proposed ordinance.

It is conceded that the *whole* of the proposed (and subsequently adopted) ordinance was not published. The records reveal that the published notice of hearing in addition to indicating the time and place thereof, stated that the "proposed ordinance is intended to regulate excavations, the operations of sand and gravel pits, stone quarries, stripping of top soil, and other uses mentioned in said proposed ordinance. . . . A copy of said proposed ordinance is on file in the Town Clerk's Office of the Town of Gates where the same may be inspected and read by any person or persons interested therein."

Following the public hearing as set forth in the notice, the Ordinance in question was adopted on February 13, 1950 and on February 14th, a notice was duly published to the effect that it had been adopted and passed and that "The object of said ordinance is to regulate the construction on, removal of materials from, filling up, draining, cleaning, operating and using any lands or other premises for sand or gravel pits, stone quarries, stripping of top soil, or for other

excavation pruposes, and prohibiting the use of any lands or other premises for the aforesaid purposes which do not comply with such regulations. A copy of said ordinance is on file in the Town Clerk's Office of the Town of Gates, New York, where the same can be read and examined by any person interested in the same."

The foregoing language used in the notice of hearing and the published notice of adoption of the ordinance becomes important because of the provisions of Chapter 686 of the Laws of 1934 which provide as follows:

> "Any law to the contrary notwithstanding, it shall be sufficient in the case of any town in Monroe County which is or may be required or permitted by statute to publish any ordinance *which such town is or may be authorized by law to adopt* in one or more newspapers so as to make such ordinance effectual, to publish in such newspaper or newspapers a summary describing the subject of such ordinance and a notice stating that the whole of such ordinance is on file with the town clerk of such town, provided that a copy of such ordinance is kept on file with the town clerk during the period of such publication in lieu of publishing such ordinance in full in such newspaper or newspapers. Nothing herein contained shall dispense with any posting of such ordinances which is or may be required or permitted by law." (interlineation mine).

This court, therefore, holds that the notice of hearing and thereafter, the notice of the adoption of the ordinance were duly published, and, in those respects, the ordinance was duly adopted.

There is one further reason for overruling the petitioner's objection to the method of adoption of this ordinance.

It would here be proper to point out that at the time of the public hearing prior to the adoption of the Excavations Ordinance, that the persons interested in quarrying appeared at the hearing and that the attorney for the petitioner further communicated with the respondents to the effect that

"on behalf of Dolomite Products Company, we wish to enter our objection to the passage of this ordinance."

The respondents, in addition to the publication of the notice of hearing and notice of adoption of the ordinance, have pointed out that the petitioner had been well informed about and had participated in discussions preliminary to the adoption of the ordinance.

The purpose of the requirement for publication of the notices is to advise those who may have any interest in, and desire to be heard upon, the proposed administrative action. It would seem that, as to those who had actual notice of the hearing, the purpose of the statute requiring publication, would have been served.

It has been held that such notice or appearance at and participation in the hearing, would constitute a waiver of any alleged errors in giving notice; and that the petitioner could not, under these circumstances, be prejudiced. See *North Shore Beach Property Owners Assn. v. Town of Brookhaven*, 115 NYS2d 670; *Gerling v. Town of Clay*, 167 NYS2d 358 (Revd. on other grounds); *McLain v. City of Chico*, 319 P.2d 24; *Hirsch v. Pawtucket*, 56 R.I. 463.

It does not follow, however, that the operations of the petitioner were illegal, contrary to established rules, or violative of any ordinances.

Let us first direct our attention to that parcel described as Exhibit "B" in the petition. For the purposes of the present proceeding it is conceded by the respondents that this land is located in an area zoned Industrial "E" under the provisions of the Zoning Ordinance of 1948. In addition there is no denial of the allegations of paragraph "2" of the petition, alleging this fact.

The provisions of the Zoning Ordinance of 1948 in subdivisions 19 and 22 of Section 60, would seem to allow operations of the character generally described in the present application.

We are, therefore, to decide whether or not the respondents have improperly denied petitioner's request for a permit and cancellation of the stop-work order.

The only evidence before the court in this regard is the request dated January 25, 1963 by petitioner's attorney to have the application acted upon, followed by a consideration of this request by the respondents on February 1, 1963. The minutes of the Town Board of that date, merely show that the request was received and read and then voted upon. Fragmentary as they are, these minutes do not reveal what matters, proposals or objections, if any, were considered by the Town Board. They merely reveal that the request was received and the application denied.

The petitioner claims, among other things, that the denial of excavating permits was predetermined by the respondents prior to any application therefor, and points to a newspaper article (Exhibit "A" attached to the Reply). This may well be, but the determination must await the procedure hereinafter directed, and it is expected that any questions in this regard, will be developed upon the taking of any testimony or the holding of any hearing. This item could be vital.

It appears that the application filed by the petitioner for a permit and for the cancellation of the stop-work order fully complied with all the requirements of the Excavations Ordinance (Secs. 5, 6, 7, 8 and 9); and, unless legal objections which have their foundation in reason, logic, and law can be established by the respondents, the application of the petitioner ought to be granted, with reference to the land described in Exhibit "B". The permit cannot be arbitrarily withheld; nor should the action of the Town Board in denying such permit, be capricious or arbitrary. It may well be that the Town Board based its grounds upon matters which it ought not to consider. This cannot be determined upon the papers before the court.

It might be well to here note that the respondents have called to the court's attention that a petition signed by people in the town objecting to the granting of the permit, was

filed with it. This fact neither adds to nor detracts from the legality of any proceedings taken by the board. It has no part in these proceedings.

At first blush, it would appear that the application of the petitioner should be granted because the permit was arbitrarily denied. However, the state of the record is not sufficiently complete for a court to pass upon it and the matter, in so far as it applies to the parcel designated Exhibit "B", is remitted to the Town Board for a full and complete consideration of the application for a permit and for the making of findings which are susceptible to review as to the sufficiency of the supporting evidence. See, *Matter of Barry v. O'Connell*, 303 N.Y. 46; *Matter of Winkler v. State Liquor Auth.*, 3 AD2d 1011, affd. 4 NY2d 856; *Matter of Elite Dairy Prods. v. Ten Eyck*, 271 N.Y. 488; *Matter of Syosset Holding Corp. v. Schlimm*, 4 A.D.2d 766; *Matter of Lusby v. Shoemaker*, 14 Misc.2d 421. See also, *Matter of Woodiwiss v. Jacobs*, 27 Misc.2d 602, 211 NYS2d 217.

With reference to the parcel described in Exhibit "C", it is undisputed that it is in a residential zone and its use is not necessarily therefore susceptible to the same rules applying to that area in the industrial "E" section.

The petitioner claims this area is a part of lands already being used for quarrying operations. The respondents deny this and further claim it has been used for farming and nursery purposes. There is no way in which this court can determine this question upon the papers before the court.

It is entirely possible that this area, too, may be used for quarrying purposes provided it can be shown that (1) it was an expansion of a non-conforming use on lands previously owned by the petitioner (*Peo. v. Perkins*, 282 N.Y. 329) and that (2) it has always been the intent of the petitioner to develop and use the entire lands owned by it, for the questioned purposes and that this was or should have been known to all involved.

These are matters of proof and cannot be assumed. All of the circumstances surrounding the use of the land, its purchase, investment, probability of nuisance, character of the operations of the petitioner, and the continuity of its operations would be of great assistance in making a proper determination; so also would its size, original character of the area, and declared or undeclared intent.

Although not every expansion or extension of certain operations will be permitted, the view has been taken that it is not essential that a nonconforming use exercised at the time a zoning ordinance is enacted should embrace an entire tract in order to entitle an owner to subsequently employ it all for the use. To so hold would deprive owners of the use of their property as effectively as if an ordinance was so drawn as to be completely prohibitive of all use. (*8 McQuillin, Mun. Corp. 3rd Edition*), Sec. 25.208, p. 521; *DeFelice v. Zoning Bd. of Appeals*, 130 Conn. 156; *Village of Ossining v. Meredith*, 190 Misc. 142.

In commenting on, and approving this theory, the Court of Appeals in *Somers v. Camarco*, 308 N.Y. 537, said, "The courts, in order to afford stability to property owners who do have existing non-conforming uses, have imposed the test of reasonableness upon such exercise of the police powers. Therefore broad general rules and tests, such as expressed in *People v. Miller*, 304 N.Y. 105, 106 N.E.2d 34, must always be considered in this context. . . . A definition of reasonableness cannot be made for all occasions, and must, of necessity, be considered anew in the light of each problem presented."

It is quite obvious that an owner intending to carry on a quarrying operation acquires more land than he thinks he will need so that he will not be a source of nuisance to his neighbors. It must be assumed that for practical and economical reasons he must begin operations at one given point and continue from there to a point on his land where his natural resource ends or at his boundary line. For the same reasons, it is not feasible for him to

quarry at different locations at the same time. To be also taken into consideration is the fact that the prior non-conforming use was not the ordinary "run of the mill" variety, but that here it involved a "diminishing asset".

Certainly, under its police powers, the Town of Gates may prescribe conditions under which the land is used, such as health, sanitary and nuisance matters. However, a non-conforming use in existence when a zoning ordinance is enacted is constitutionally protected and will be permitted to continue, notwithstanding contrary provisions of any later ordinance which might impose arbitrary or unreasonable conditions. (*People v. Miller*, 304 N.Y. 105; *Mat. of Fairmeadows Mobile Village Inc. v. Town of Newfane*, 30 Misc.2d 143). As already indicated, there are no facts upon which it can be stated that the regulations of and determination made under the Excavations Ordinance, are reasonable or legal.

This court, therefore, concludes that:

1. The matter, insofar as it applies to the prayer for relief directed to the property described in Exhibit "B" attached to the petition (and set forth in paragraph "2" of the petition), is remitted to the Town Board for a full and complete consideration of the application in which the petitioner shall be afforded an opportunity to be heard and present evidence; and for the making of findings which are susceptible to review, as to the sufficiency of the evidence, which should be done forthwith; and

2. The matter, insofar as it applies to the prayer for relief directed to the property described in Exhibit "C" attached to the petition (and set forth in paragraph "3" of the petition), is returned to Special Term to take proof and for the presentation and submission of evidence as to (a) what use this particular land was put to prior hereto, (b) as to the character of the neighborhood at the present time and at all times prior thereto, (c) as to the evi-

denced intent of the petitioner as to the use of the land, when the same was purchased, (d) the character, scope and area of the operations of the petitioner, as well as all other facts which would permit a determination to be made as to whether this land is susceptible to the theory of law that there was and is a proper expansion or extension of a non-conforming use.

The prayer for relief also requested an order directing that excavating permits be issued to the petitioner. For the foregoing reasons, this request must await the completion of the hearings described in the above paragraphs designated (1) and (2).

Submit order.

Dated: July 10, 1963.

/s/ Domenick L. Gabrielli
Supreme Court Justice

[Exhibit 4, cont'd]

At a Special Term of the
State of New York held in
and for the County of
Monroe at the Courthouse
in the City of Rochester
on the 5 day of August 1963

PRESENT: HONORABLE DOMINICK L. GABRIELLI,
JUSTICE.

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

In the Matter of the Application of
DOLOMITE PRODUCTS CO., INC.,
Petitioner,

against

FRANK F. KIPERS, CONSTANZO CARUSO, NELSON DENIS, WILLIAM FORBES, and MARY MURRAY, constituting the Town Board of the Town of Gates, New York,

Respondents.

On reading and filing the petition herein, verified the 25th day of February, 1963, praying for an order, pursuant to Article 78 of the Civil Practice Act, directing respondents to withdraw, lift, rescind and nullify certain stop-work orders served upon petitioner and directing respondents to approve certain applications for excavating permits and to issue such permits upon the filing of appropriate undertakings by the petitioner, the notice of application, the reply of the petition verified the 29th day of March, 1963, the affidavit of ROBERT C. ODENBACH duly sworn to the 29th day of March, 1963, together with the exhibits annexed to the

aforesaid petition, reply and affidavit all with due proof of service thereof upon respondents, and all in support of the application; and the answer of respondents verified the 13th day of March, 1963, the affidavit of FRANK E. KIPERS, duly sworn to the 12th day of March, 1963, the affidavit of EVERETT B. RUSSELL, duly sworn to the 12th day of March, 1963 and the exhibits annexed to said answer and affidavits, with due proof of service thereof upon petitioner, all in opposition thereto; and after hearing HARRIS, BEACH, WILCOX, DALE AND LINOWITZ and WIEDMAN AND WIEDMAN, ESQS. by CHARLES W. WILCOX, ESQ., of counsel, in support of the petition, and NEIL F. BUBEL, ESQ. in opposition thereto, and due deliberation having been had thereon, and upon the decision of this Court filed herein;

NOW, on motion of HARRIS, BEACH, WILCOX, DALE AND LINOWITZ and WIEDMAN AND WIEDMAN, attorneys for petitioner, it is

ORDERED that the application so far as it related to the premises described in Exhibit B attached to the petition and set forth in Paragraph 2 of the said petition be and the same hereby is remitted to the Town Board of the Town of Gates, and it is

FURTHER ORDERED that respondents, constituting the Town Board of the Town of Gates be and they hereby are directed forthwith to give full and complete consideration to petitioner's application and to afford petitioner an opportunity to be heard and to present evidence upon which respondents as aforesaid are directed to make findings which are susceptible to review as to the sufficiency of the evidence presented, and it is

FURTHER ORDERED that the application so far as it related to the property described in Exhibit C attached to the petition and set forth in Paragraph 3 of the petition be and the same hereby is returned to the Special Term of this Court for the purpose of taking proof and for the presentation and submission of evidence concerning:

a) The use to which the particular land was put prior to the instant proceeding;

b) the character of the neighborhood surrounding the said land at the present time and at all times prior hereto;

c) The intent evidenced by the petitioner concerning the use of this land at the time same was purchased by petitioner;

d) The character, scope and area of the operations of the petitioner, as well as all other facts sufficient to permit a determination to be made as to whether this land is susceptible to the theory of law that there was, and is, a proper expansion or extension of a non-conforming use, and it is

FURTHER ORDERED that a determination upon the application for an order directing the issuance of excavating permits be and the same hereby is continued pending the completion of the hearings by the Town Board of the Town of Gates and by this Court at Special Terms as hereinabove directed.

Dated: August 5, 1963

s/ Dominick L. Gabrielli
J. S. C.

/s/ A. Gould Hatch, Clerk
Filed Aug. 6, 1963-10:10 AM
Monroe County Clerk's Office

[Certification - true copy]

Appendix (Exhibit 5) Excerpt from 1948 Zoning Ordinance

THE ZONING ORDINANCE OF THE TOWN OF GATES

[Adopted after Public Hearing and after report of the Zoning Commission by the Town Board on January 23, 1948; effective as of January 23, 1948.]

* * *

"E" DISTRICTS (Industrial)

SECTION 60. "E" DISTRICTS – Uses. No building or structure shall be erected, structurally altered, reconstructed, or moved, and no building, structure, land or premises shall be used in any district designated on the Official Zoning Map of the Town of Gates as an "E" District except for one or more of the following purposes:

1) Manufacturing plant not prohibited by Section 61.
2) Bag and Carpet Cleaning.
3) Dextrine, Glucose or Starch manufacture.
4) Brewing or Distilling of Beverages
5) Grain Drying or Poultry Feed Manufacture from refuse mash or refuse grain.
6) Penal or correctional institution.
7) Assembly or dance hall.
8) Riding or boarding stables.
9) Electric sub-station.
10) Amusement park, fairgrounds or circus grounds.
11) Cleaning and dyeing establishment.
12) Flour or feed mill.
13) Poultry slaughter house.
14) Gas manufacture from coal, coke, petroleum or the storage thereof.
15) Carbon or lamp black manufacture.

16) Builders' supply and lumberyard.

17) Petroleum storage in quantities greater than tank car lots.

18) Power forge, structural iron or pipe works.

19) Rock crushing, sand and gravel pit.

20) Locomotive or railway car manufacture.

21) Railway roundhouse or shop.

22) Any industrial process emitting dust, odor, gas, fumes, noise, or vibration when comparable in character to or not in aggregate amount exceeding that of any use specified above in this subdivision.

* * *

Appendix (Exhibit 6) Excerpt from 1950 Excavations Ordinance

EXCAVATIONS ORDINANCE OF THE TOWN OF GATES, MONROE COUNTY, STATE OF NEW YORK

The Town Board of the Town of Gates, Monroe County, New York, pursuant to the authority granted by the statutes of the State of New York, does hereby enact and ordain as follows:

SECTION 1. TITLE

This ordinance shall be known as the "Excavations Ordinance of the Town of Gates, Monroe County, New York."

SECTION 2. PURPOSE

It is the purpose of this ordinance to regulate the construction on, removal of materials from, filling up, draining, cleaning, operating and using any lands or other premises for sand or gravel pits, stone quarries stripping of top soil, or for other excavation purposes, and prohibiting the use of any lands or other premises for the aforesaid purposes which do not comply with such regulations.

SECTION 3. APPLICATION OF ORDINANCE

(a) This ordinance does not apply to excavations made in connection with the construction of a building or other structures or in connection with any farm or public use, or in connection with the construction of sewers or septic tanks or the laying of water mains or public utility installations or for drainage purposes, nor does it apply to the removal of sand, gravel, stone, other minerals or top soil from one portion of an owner's premises to another portion of the same premises where such removal is made for the improvement of said property or in connection with the use and enjoyment thereof.

(b) No excavation shall be commenced or carried on and no sand, gravel, stone, minerals or top soil shall be removed from any land or premises except as specified in the preceding paragraph of this section unless in conformity with the provisions of this ordinance.

SECTION 4. PERMIT REQUIRED

No person, firm or corporation shall make any excavation or remove any sand, gravel, stone, minerals or top soil from any land or premises without obtaining a permit therefor.

SECTION 5. APPLICATION FOR PERMIT

The application for each permit shall be in writing and signed by the owner or occupant of the premises. It shall state (1) the name and address of the applicant; (2) the name and address of each owner of the premises; (3) a description of the premises sufficient to readily identify the same; (4) a statement of each mortgage or other lien upon the premises with the amount unpaid thereon; (5) the name and address of the owner and holder of each mortgage or other lien upon the premises; (6) a statement setting forth the nature of the proposed excavation and whether it is proposed to remove sand, gravel, stone minerals or top soil from the premises, and if so, the approximate quantity which it is proposed to remove from the area from which it is to be taken; (7) a statement of whether or not the applicant desires a permit to conduct a blasting operation in connection with the proposed excavation. Each application shall be accompanied by a statement in writing and signed by each owner of the premises other than those signing the application and also signed by the holder of each mortgage or other lien upon the premises consenting that the proposed excavation be made and materials be removed from the premises. Each application shall likewise be ac-

companied by a map prepared by a duly licensed engineer or surveyor showing the premises involved, the nature, extent and location of the proposed excavation, the location of all buildings upon said premises and the location of all public highways and private streets or right of way upon said premises or abutting the same.

SECTION 6. FILING OF APPLICATION AND ACTION THEREON

Each application together with the accompanying papers required by the foregoing section shall be filed with the Town Clerk. The Town Clerk shall thereupon transmit such application to the Town Board, and the Town Board, after making such investigation as it deems necessary, shall approve or disapprove said application and return the same to the Town Clerk, who shall thereupon notify the applicant in writing of the action taken by the Town Board.

SECTION 7. THE UNDERTAKING

After the approval of an application by the Town Board and before the issuance of any permit, the applicant and each owner of record of the premises other than the applicant, shall make, execute and file with the Town Clerk a bond with a solvent surety corporation as surety in a sum not less than Two Thousand Dollars ($2,000.00), which bond shall be conditioned upon the faithful compliance with all the terms and provisions of this ordinance and of the permit to be issued thereunder. The principals and sureties shall further agree to idemnify and save harmless the Town of Gates and the Superintendent of Highways of said Town from any and all damage to property of said Town which may be caused by the contemplated excavation of any operations in connection therewith. In the event the applicant desires a permit to conduct blasting operations in connec-

tion with the proposed excavation, the undertaking shall be in the sum of Ten Thousand Dollars ($10,000.00), and in addition to the foregoing provisions shall contain an undertaking on behalf of the principals and surety to indemnify all property owners, both public and private, against any damage caused by reason of said blasting operations. Said bond shall be approved as to form, manner of execution and sufficiency of surety by the Town Board.

SECTION 8. INSURANCE

Before the issuance of any permit, the applicant shall also file with the Town Clerk a certificate showing that the said applicant or the person proposing to do said work carries compensation insurance in accordance with the statutes of the State of New York, and also carries public liability insurance with limits of Ten Thousand Dollars - Twenty Thousand Dollars ($10,000.00-$20,000.00) for personal injuries, and Five Thousand Dollars ($5,000.00) for damage to property.

SETION 9. FEES

Before the issuance of any permit, the applicant shall pay to the Town Clerk a fee of Ten Dollars ($10.00) for a permit covering an area not exceeding five thousand (5,000) square feet, and a fee of Twenty Dollars ($20,00) for an area exceeding five thousand (5,000) square feet.

SECTION 10. ISSUANCE AND FORM OF PERMIT

Upon the approval of the application by the Town Board and the filing and approval of the undertaking above prescribed and the filing of the certificate of insurance and payment of the fees above prescribed, the Town Clerk shall issue a permit: any permit so issued shall be effective from and after the date of issue and shall expire three (3) months thereafter. If the application is for commercial operation

of a sand and gravel pit or quarry, the permit may be issued for a period of one (1) year. All permits shall expire upon the expiration date thereof unless for a good cause shown, the time is extended by the Town Board. If the application involves blasting operations and the required undertaking for such operations has been filed and approved, the permit shall specify that blasting operations are permitted.

SECTION 11. REGULATIONS FOR EXCAVATIONS

All excavations and the removal from any land or premises of sand, gravel, stone, or other mineral or top soil, shall be subject to the following regulations:

(a) No excavation shall be made within one hundred (100) feet of any street or highway or private right of way and adequate precaution shall be taken to prevent material falling upon any street or highway or right of way to prevent undermining of the same.

(b) The loading of all trucks or other vehicles removing sand, gravel, stone, other minerals or top soil from the premises shall be supervised and no such vehicle or truck shall be loaded in such a manner that sand, gravel, stones or other debris will be scattered upon the streets or highways.

(c) During any excavation operations, all reasonable precautions must be taken to prevent dust and sand from flying or being blown from the premises.

(d) Upon the completion of an excavation and prior to the expiration of the permit granted, the premises shall be filled with clean- non-burnable fill, containing no refuse, garbage, offal or other deleterious or unwholesome material, and said premises shall be graded to conform to the grade of the abutting highways and premises, and in the case of the removal of top soil, at least four inches of top soil shall be left over the entire area of the excavation which shall be

reseeded with pasture mixture or other fast-growing surface vegetation and such reseeding shall continue until the growth is re-established.

(e) No blasting operation shall be conducted upon any premises unless the permit issued specifically permits blasting. Where blasting operations are conducted, open blasting shall be so covered and protected as to prevent rocks and debris from being thrown upon any adjoining highway or property, and in all blasting operation, heavy and excessive charges of such nature as to produce concussion and vibration of the underlying strata so as to produce damaged to adjoining premises are prohibited.

(f) When so ordered by the Town Board, the applicant or owner shall construct and maintain a fence of suitable height around said excavation sufficient to prevent a person or animal from falling into the same. Such fence, however, shall not be constructed or maintained nearer than forty (40) feet to any such excavation or the face of any quarry wall.

SECTION 12. CERTIFICATION OF COMPLETION

Upon the completion of any excavation, the holder of the permit shall file with the Town Clerk a map prepared by a duly licensed engineer or surveyor showing a cross-section of the property and the elevations thereof after the completion of the work, with the certificate of such engineer or surveyor that the property has been graded and that four inches of top soil remains and has been reseeded, and that there has been due compliance with all the provisions of this ordinance. Upon the filing of such map and certificate, the Town Engineer or such other town employee or official as shall be designated by the Town Board to make a final inspection of said premises and if satisfied that said work has been performed and completed in conformity with the requirements of this ordinance, he shall make and file with the

Town Clerk his certificate, certifying that all of the provisions of this ordinance and of the undertaking have been fully complied with. Upon the filing of such certificate, the undertaking shall terminate.

SECTION 13. ISSUANCE OF PERMIT NOT TO WAIVE COMPLIANCE WITH OTHER STATUTES AND ORDINANCES

The issuance of a permit pursuant to this ordinance shall not be deemed to waive compliance by the holder thereof or by the property owner of any statute of the State of New York or any ordinance of the Town of Gates.

SECTION 14. PENALTIES

Any person, firm or corporation who violates any provisions of this ordinance, shall be guilty of a misdemeanor and subject to a fine of not less than Fifty Dollars ($50.00) not more than One Hundred Dollars ($100.00) or to imprisonment of not less than one day nor more than six (6) months, or both such fine and imprisonment and, in addition, the violation of this ordinance or any of the provisions thereof shall subject the person, firm or corporation violating the same to a civil penalty in the sum of Fifty Dollars ($50.00), to be recovered by the Town of Gates in a civil action. When a violation of this ordinance or any of the provisions thereof is continuous, each twenty-four (24) hours thereof shall constitute a separate, distinct and additional violation.

SECTION 15. VALIDITY

If any section, paragraph, subdivision or provision of this ordinance shall be adjudged invalid or held unconstitutional, the same shall not affect the validity of this ordinance as a whole or any part or provision thereof other than the part so decided to be invalid or unconstitutional.

Appendix (Exhibit 7) Order of Remittitur of the Court of Appeals of the State of New York

STATE OF NEW YORK,

In Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh day of July A.D. 1967.

Present, Hon. Stanley H. Fuld, Chief Judge, presiding.

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4 Mo. No. 645
In the Matter of
the Application of Dolomite
Products Company, Inc.,
Appellant,
vs.
Frank W. Kipers, &ors.,
constituting the Town Board
of the Town of Gates, New
York, Respondents.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there were presented and necessarily passed upon questions involving the construction of the Constitution of the United States, viz.:

Petitioner contended that the police power of the municipality (Town of Gates) had been unconstitutionally exercised against it and that its property had been unconstitutionally taken, without just compensation, in violation of the Fifth Amendment to the Constitution of the United States as applied to the states by the Fourteenth Amendment. The Court of Appeals held that there was no constitutional impairment of any property right of the petitioner.

AND the Supreme Court of Monroe County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A Copy

[SEAL]

/s/ Gearon Kimball
Deputy Clerk

Appendix (Exhibit 8) Appellant's Notice of Appeal to the New York Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of the
Application of Dolomite
Products Company, Inc.,
Appellant,

v. No. 93

FRANK F. KIPERS, & ORS.,
constituting the Town Board
of the Town of Gates, New York,
Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1. Notice is hereby given that Dolomite Products Company, Inc., the Appellant above named, hereby appeals to the Supreme Court of the United States from the judgment of the Court of Appeals, State of New York, dated March 2, 1967, affirming the opinion of the Supreme Court, Appellate Division, Fourth Department, entered March 30, 1964, and from the Order of said Court of Appeals denying Petition for Re-Argument dated April 20, 1967.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

II. The clerk will please prepare a transcript of the Record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Record on Appeal to the Court of Appeals, including all Exhibits thereto;
2. Briefs on Appeal to the Court of Appeals;

3. Memorandum Opinion of the Court of Appeals issued in this action on March 2, 1967, together with dissenting Opinion entered on same date;

4. Motion for Re-Argument dated March 29, 1967;

5. Order denying Motion for Re-Argument dated April 20, 1967;

6. Certificate of State Court as to existence of federal questions dated July 7, 1967.

III. The following questions are presented:

1. Have Appellant's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States – protection against the deprivation and taking of its private property without just compensation and due process of law – been violated by the action of the Defendants in refusing to make the necessary finding as to "pre-existing use" and to thereupon issue the Appellant the necessary permits to allow the Appellant to continue to engage in the lawful occupation of rock quarrying on its property, an occupation in which it has engaged and a use to which it has put its property without interruption since 1925?

2. Are the 1948 Zoning Ordinance, the 1950 Excavations Ordinance and the 1963 Amended Zoning Ordinance of the Town of Gates as applied to the Appellant and the facts of this case repugnant to the principles of the Fifth Amendment, as the same are applied by the Fourteenth Amendment to the Constitution of the United States in that such application resulted in the effective taking and deprivation of Appellant's real property and the termination of the business of Appellant without compensation and due process?

3. Did the Appellate Division of the Supreme Court and the Court of Appeals have jurisdiction to reverse an order of the trial court issued on the basis of two separate court opinions, both of which independently support such order, where only the order and one such opinion were

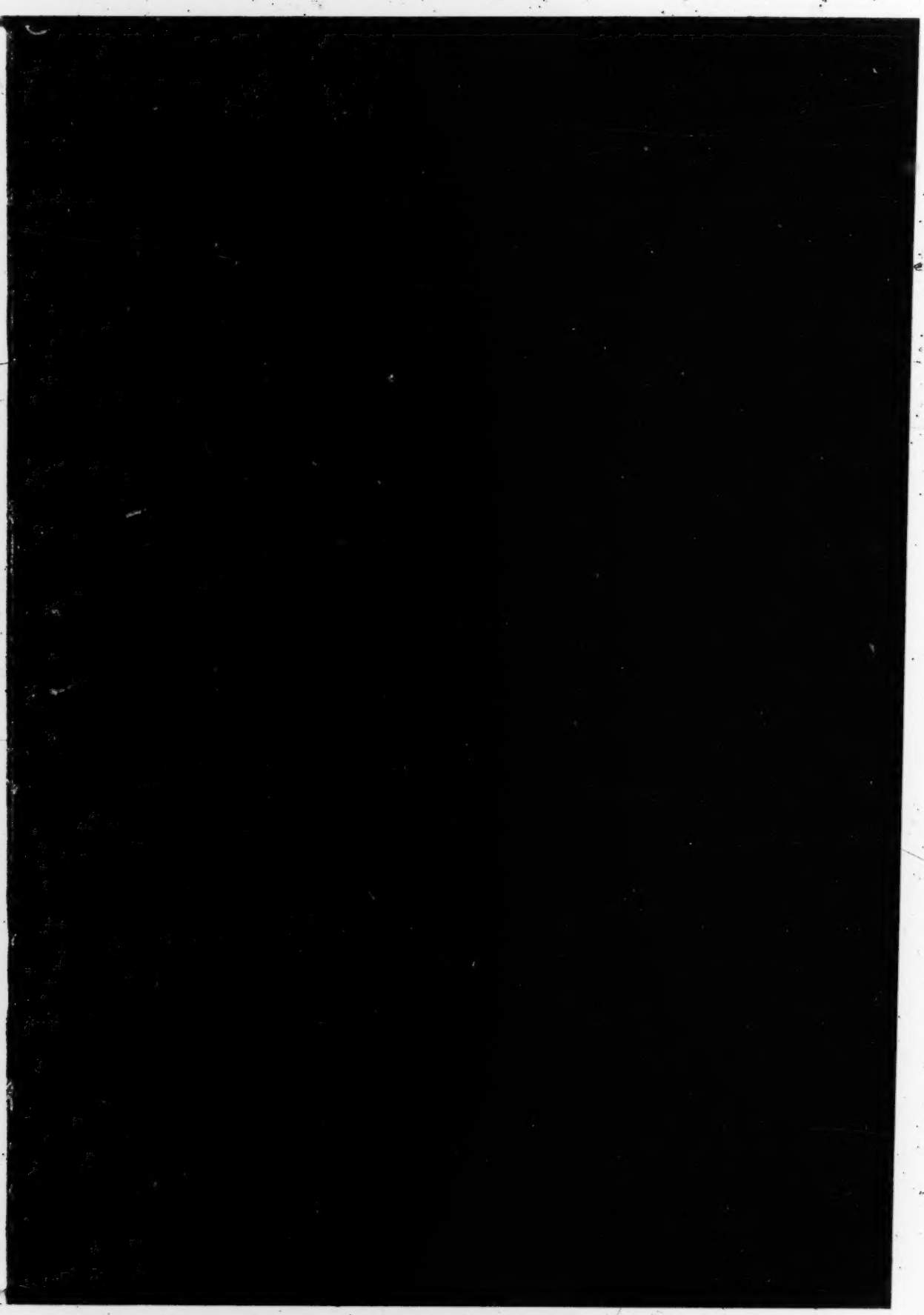
appealed from and the other opinion became final insofar as it was not appealed from?

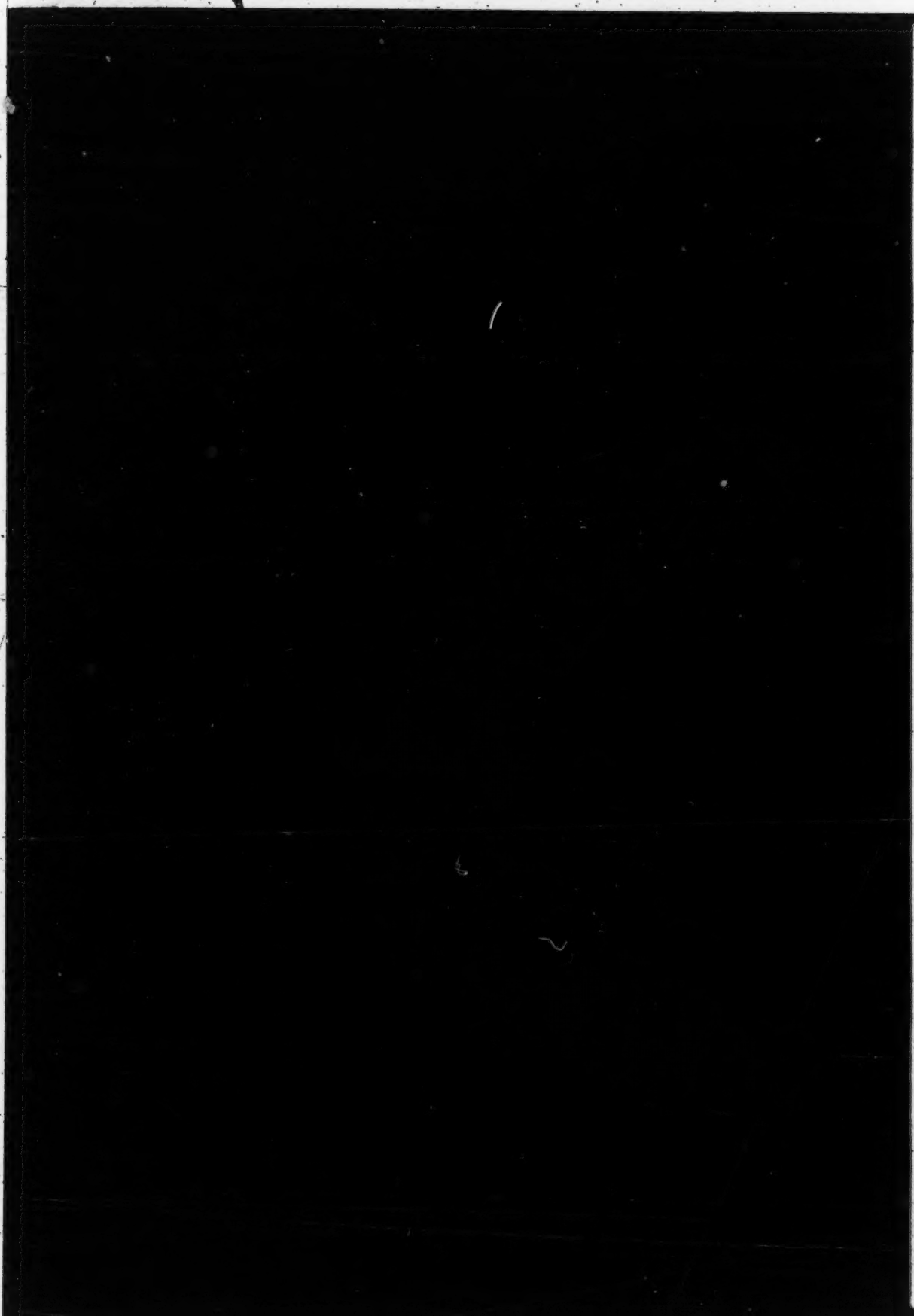
/s/ Richard Maguire
/s/ Charles Emmet Lucey
Attorneys for Appellant

/s/ Frederick Wiedman, Jr.
Of Counsel

July 10, 1967

[Certificate of Service, dated July 17, 1967]





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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 619

In the Matter of the Application of

DOLOMITE PRODUCTS COMPANY, INC., *Appellant*,

v.

FRANK F. KIPERS & ORS., constituting the Town Board of the Town of Gates, New York, *Appellee*.

On Appeal From the Court of Appeals of the State of New York

MOTION TO DISMISS (AND/OR AFFIRM)

Appellee, pursuant to Rule 16 respectfully moves that the decision of the Court of Appeals of the State of New York be affirmed, on the ground that the question is so unsubstantial as not to warrant further argu-

ment, and moves that the appeal be dismissed for lack of jurisdiction under 28 U.S.C. § 1257(2).

OPINIONS BELOW

The opinion of the court of original jurisdiction, the Supreme Court of New York, Special Term, held for the Appellant (42 Misc. 2d 11, 247 N.Y.S. 2d 396 (1964)) and is set forth at pp. 2-12 of the certified Record on Appeal. The *per curiam* Opinion of the Appellate Division holding for the Appellee, reversing the lower court (23 App. Div. 2d 339, 260 N.Y.S. 2d 918 (1965)) is set forth at pp. 228-237 of the certified Record on Appeal. On Appeal the Court of Appeals affirmed the opinion of the Appellate Division in favor of the Appellee. (19 N.Y. 2d 739, 279 N.Y.S. 2d 192 (1967)).

JURISDICTION

The jurisdictional requisites as set forth in the Jurisdictional Statement of Appellant are insufficient for purposes of review of this case on appeal. This contention is argued in detail in Appellee's argument.

QUESTIONS PRESENTED

1. May Appellee invoke the jurisdiction of this Court under 28 U.S.C. § 1257(2)?

2. Does a substantial question of Federal law exist?

STATUTES AND ORDINANCES INVOLVED

28 United States Code, section 1257 (2) and three local ordinances. The Zoning Ordinance of the Town of Gates (1948) (R. 59), the Excavations Ordinance of the Town of Gates (1950) (R. 23) and the Zone Ordinance of the Town of Gates (1963) (R. 43) are involved.

STATEMENT OF THE CASE

1. Background

This case concerns a local zoning action taken by the Town Board of the Town of Gates (Pop. 22,000) involving three community zoning ordinances affecting property within its jurisdiction (15 sq. miles).

Appellant owns 85 acres of land within the Town of Gates in the County of Monroe. The property fronts on the south side of Buffalo Road for approximately Twenty Six Hundred feet (2,600′) and extends to the south approximately Eighteen Hundred and Fifty feet (1,850′) (R. 36). This entire area amounting to Eighty Five (85) acres was purchased in 1925 (R. 101).

Appellant commenced quarrying a parcel of this land amounting to Fifty (50) acres in 1929 or 1930 (R. 111). This parcel referred to in the courts below as Parcel A lies between Buffalo Road on the north and the New York Central Railroad track on the south (R. 36, 111). The land south of the railroad track has never been quarried. The Thirty Five (35) acres south of the railroad were classified under two different zoning classifications under the 1948 Ordinance. The southern most One Hundred Seventy Five feet (175′) referred to as Parcel C was zoned "Residential." The parcel lying between the railroad tract and the southern-most 175 feet referred to as Parcel B was zoned "Industrial."

For a period of forty years from the time of purchase, and subsequent to the 1948 Zoning Ordinance, continuing until 1962, Parcel, B and C were never quarried. On January 2, 1962, Appellee hired a municipal planning firm to conduct a study and make recommendations for future land use and development

of the Town of Gates. (R. 40, 55, 57, 58). As a result of this study, a new zoning ordinance was enacted by the Gates Town Board on January 25, 1963. Under this ordinance Parcel B was zoned "Manufacturing" (R. 44), and Parcel C was zoned "Residential" and considered a buffer zone. It is undisputed that blasting and quarrying are not permitted uses for these parcels under the Ordinance (R. 43-44).

This litigation began when Appellant commenced stripping top soil from Parcel B in December, 1962. An excavation permit was not obtained by Appellant as required by the Gates Excavation Ordinance of 1950 and, therefore, Appellee issued a stop work order on December 28, 1962 (R. 35, 46-47). On January 25, 1963, Appellant applied to Appellee for an excavation permit for Parcels B and C (R. 16). Appellee denied the applications on February 1, 1963 (R. 48-49).

2. Legal Proceedings

Following denial of Appellant's applications for excavation permits, Appellant commenced a proceeding to compel issuance of the permits. The Order of the Special Term of August 5, 1963, as to Parcel B, remitted the application to the Town Board for a statement of reasons for its denial (R. 91, 83), and as to Parcel C, it directed a hearing to examine the theory of Appellant pertaining to a non-conforming use.

Prior to the submission of the Town Board statement of reasons for denial to Special Term, the Parcel C hearing was held and an order entered thereon on October 7, 1963, and it is from that order that this appeal lies (R. 2). The decision underlying the order purports to dispose of all questions relating to both Parcels B and C without reference to the remitter of the Parcel B question to the Town Board.

The order announced that both Parcels B and C were pre-existing non-conforming uses exempt from the 1948 Zoning Ordinance. The order was silent regarding the enactment of the 1963 Zoning Ordinance prior to the denial of Appellant's applications. Because the order was a final determination and directed that the excavation permits be issued (R. 6) an appeal was taken to the Appellate Division by the Town of Gates.

The Appellate Division reversed the opinion of Special Term stating that the Special Term's conclusion that Parcels B and C were in the posture of non-conforming uses was contrary to the weight of the evidence. It stated that: "It is clear from the record that no quarrying operations have been carried on in Parcels B and C since the acquisition of these properties 40 years ago." (R. 231).

Further, the Court felt that in weighing Appellant's economic interests against the Town's progressive and contemporary planning, denial of the permits was justified. (R. 232).

Appellant thereupon appealed to the Court of Appeals which affirmed the Order of the Appellate Division. The highest Court of the State of New York stated:

> "... the record makes it clear that the appellant carried on no quarrying operations on Parcels B and C since it acquired those properties more than 40 years ago. And contrary to the intimations in the dissenting opinion, the appellant, as the Appellate Division pointed out, offered no proof either (1) "as to the financial loss it may suffer" (23 A.D.2d, at p. 342); (2) or "as to the value of the land in Parcels B and C which ... are appar-

ently good residential building lots of substantial value which can be realized by (appellant) if its operations are limited to Parcel A (23 A.D.2d, at p. 342); or even (3) that "the parcels in question are more valuable for quarrying than they are for sale as residential lots" (23 A.D.2d, at p. 343)."

After losing two appeals in the New York State Courts, Appellant now seeks a further review by the Supreme Court of the United States to reverse the adverse decisions before these state appellate tribunals on the basis that a substantial question of Federal law exists. Appellee maintains that there are no compelling reasons for further review of this case, and that no substantial question of Federal law exists. In fact Appellee maintains that Appellant may not invoke the appellate jurisdiction of this Court under 28 U.S.C. § 1257(2). For these reasons the decision of the New York Court of Appeals should be affirmed and the appeal dismissed.

ARGUMENT

1. Appellant May Not Invoke the Jurisdiction of This Court Under 28 U.S.C. § 1257(2) for Review by Appeal

Appellant seeks review by appeal under 28 U.S.C. § 1257(2). To come within this section Appellant must have made specific and *plain* in the state court the contention that the application of the ordinances *to his particular circumstances* would make the ordinances *void* under Federal law. If he chooses not to phrase his claim in that manner but argues instead that his federal rights prevent application of the municipal ordinance *to him*, an adverse decision amounts to denial of his assertion of federal rights rather than a validation

of the ordinance and review can be had in the Supreme Court *only* via certiorari pursuant to 28 U.S.C. § 1257 (3). *Mergenthaler Linotype Co.* v. *Davis,* 251 U.S. 256, 259 (1920); Stern, Supreme Court Practice, at 67 (3d ed. 1962).

Appellee submits that Appellant may not claim jurisdiction of this Court under 28 U.S.C. § 1257(2). Appellant in his brief before the New York Court of Appeals states:

> "In the case at bar, *we are not questioning the validity* of the zoning ordinance, but merely the affect of such ordinance upon the continued operation of *respondent's business.*" (Italics added). (p. 11).

And again:

> "It should also be pointed out that, in the case at bar, *Appellant is not questioning the validity* of the Zoning Ordinance of the Town of Gates. . . ." (Italics added). (p. 12).

The validity of a state statute or local ordinance is sustained for the purpose of an appeal under 28 U.S.C. § 1257(2) where the state court holds the statute or ordinance to be constitutional and consistent with the Constitution, treaties, or laws of the United States. In a notice of motion to amend Remittitur the Appellant moved the New York Court of Appeals to certify that Appellant on appeal raised questions under the Constitution of the United States and that the New York Court of Appeals necessarily passed upon them.

The order of the Court of Appeals issued in response said:

> "Petitioner contended that the police power of the municipality (Town of Gates) has been unconsti-

tutionally exercised against *it* and that its property has been unconstitutionally taken, without just compensation, in violation of the Fifth Amendment to the Constitution of the United States as applied to the states by the Fourteenth Amendment. The Court of Appeals held that *there was no constitutional impairment of any property right of the petitioner.*" (Italics added). (Appendix, Exhibit 7, p. 69, Appellant's Jurisdictional Statement.)

The Court of Appeals refused to hold the Ordinance repugnant to the United States Constitution, or to pass upon the validity of the Ordinance.

The record including the motion to amend the Remittitur and the subsequent order of the Court of Appeals is quite clear. In the courts below Appellant did not advance a clear and unambiguous contention that the Ordinance was *void.* The validity of the Ordinance was never questioned. Indeed, the highest court of the State of New York recognized that Appellant claimed a *personal* impairment of a property right and it rejected that claim.

Nowhere in the original memorandum opinion or in the amendment does the Court of Appeals ever discuss the validity of this ordinance. The Court of Appeals was aware that Appellant had never contested the validity of the local ordinance; and because Appellant did not contest the validity of the ordinance below it can not now seek review by appeal under 28 U.S.C. § 1257(2). *Charlestown Federal Savings & Loan Assn.* v. *Alderson,* 324 U.S. 182, 185-188 (1944). Appellant moves for the dismissal of the appeal on the ground that the jurisdiction of this Court may not be invoked under 28 U.S.C. § 1257(2).

2. No Substantial Questions of Federal Law Exist

(A) *There are no valid reasons for further review of this case.* The issue in the lower courts involved a simple and uniquely narrow local zoning matter: did Appellant have a non-conforming use as to Parcels B and C (areas south of the railroad tracks) notwithstanding the ordinance enacted by the Town of Gates on January 23, 1963. Appellant never quarried the land south of the railroad tracks in the forty years that it owned it, nor was a permit sought during almost all of that period. Moreover, under the 1948 ordinance, a permit to quarry was never obtained during a fifteen year period ending with the ordinance changes of 1963.

During the forty year period the only activity within the area was preparation for use which did not begin until 1949, and included only the stripping of top soil from a limited area in 1949, and some test drilling and construction of a berm in 1962. Preparation for use does not constitute use.

Appellant cites numerous cases supporting his position, such as *McCaslin* v. *City of Monterey Park*, 163 Cal. App.2d, 339, 329 P.2d 522 (1958). *McCaslin* was an action to enjoin enforcement of zoning ordinances designed to compel discontinuance of plaintiff's property as a quarry. The issue was the validity of the provisions of the zoning ordinance as applied to plaintiff's operations. But in that case the Court reacted in exactly the same manner as the New York Courts in the instant case, to wit:

> "Of course, plaintiff's nonconforming use of the property in question can not be expanded or extended to a separate parcel called Parcel 2 in the record or to the 200-foot buffer area along the west-

> erly end of the property in question adjacent to the residential area. To this extent the ordinance prohibiting the expansion or extension of nonconforming use to 'the same or adjoining property' is applicable to Plaintiff." (163 Cal. App. 28 339 at 350).

Appellant further cites as authority supporting his case, *Town of Billerica* v. *Quinn,* 320 Mass. 687, 71 N.E.2d 239 (1947), and *Borough of Cheswick* v. *Bechman,* 352 Pa. 79, 42 A.2d 60 (1945). The cases are similar. In the former case the town sought to enjoin defendant from stripping loam from a tract in violation of the town zoning by-law. The Court stated:

> "It is plain that the Legislature intended that existing uses should be preserved. It is equally plain that under the statute and the by-law they are not to be extended." (320 Mass. 687 at 688).

And again:

> "The mere intention to strip the remainder of the land does not amount to an existing use of it." (320 Mass. 687 at 690).

The Court stated that the mere stripping for the purpose of sale of loam from a comparatively small area of land before the land became subject to the law did not establish stripping as an existing use of the entire tract.

Appellant cites numerous New York cases which were, of course, fully considered by the New York Courts when they decided against the Appellant. At that time the Appellate Division stated:

> "It would be patently unfair to the homeowners who have built residences in the area to hold that the intention to quarry, not carried out for over

a 40-year period, is sufficient reason to enable respondent to tack on the non-conforming use of Parcel A to Parcels B and C. The test of the character of Parcels B and C should be the use made of these parcels prior to the adoption of the zoning ordinance which now makes quarrying illegal without permit. It is not consonant with progressive and contemporary planning to permit one to purchase a large parcel of real property, work thirty-five acres of it and do nothing for 40 years with the balance of forty-seven acres but, nevertheless, have the right some time in the distant future to make a non-conforming use of it in violation of an ordinance prohibiting it and to the great detriment of the adjacent homeowners. Such a philosophy of planning could stunt or kill the growth of the substantial area of properties surrounding the parcels in question, for abutting owners would be required to wait, as in the instant case, for decades to determine the use which could be made of the property." (23 App. Div.2d 343). (R. 232).

(B) *The decisions below are clearly correct.* The great bulk of the Appellant's appeal is directed to arguments that the decisions below were incorrect. Appellant would invoke the jurisdiction of this Court simply to re-argue one more time the findings below. Of particular concern to the Appellant is the dollar value of the taking.

The Court of Appeals fully contemplated this issue and concluded that:

". . . the appellant . . . offered no proof either (1) as to the financial loss it may suffer . . . (2) or as to the value of the land in parcels B and C which . . . are apparently good residential building lots of substantial value which can be realized by (appellant) if its operations are limited to

> parcel A . . . or even (3) that the parcels in question are more valuable for quarrying than they are for sale as residential lots." (23 App. Div.2d 342-343).

There are no reasons for this Court to undertake a re-evaluation of the dollar argument or any of the other points of local zoning litigated below. Appellant's arguments are evidentiary and factual and the Court does not "grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnston,* 268 U.S. 220, 227 (1925).

In *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, (1949) the Court restated its position:

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." (336 U.S. 271 at 275).

Appellant's choice of legal precedent exemplifies the strictly factual nature of this question. Appellant asks this Court for another review and cites in support of his argument of substantiality, *Ex Parte Kelso,* 147 Cal. 609, 82 P. 241 (1905). *Kelso* can be easily distinguished from the instant case because the former concerns the *maintenance* and *operation* of a quarry in connection with existing zoning and the prohibition of that existing use by subsequent re-zoning. In the instant case there was no conformity to existing zoning, no maintenance, no operation. In fact, the only similarity is the quarrying itself.

The Court stated further:

> "Whether or not a certain limitation or regulation is essential is largely a question for the leg-

> islative department, to be determined with reference to all the *existing circumstances*, and the courts will not ordinarily interfere where it can be seen that the regulation has some proper relation to an object within the domain of the public power of the state, which . . . includes all regulations having reference to 'the comfort, safety or welfare of society.'" (Italics added), (147 Cal. 609 at 612).

Appellee submits that the existing circumstances in *Kelso* are completely dis-similar and have no relevance to the instant case.

Clearly, the narrow and limited issues in this case do not present a substantial question of law. In *Zucht* v. *King*, 260 U.S. 174 (1922) the Court dismissed Appellee's claim stating:

> "Although the validity of a law was formally drawn in question, it is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not . . . substantial in nature." (260 U.S. 174 at 176).

Appellee contends that in the instant case Appellant has no substantial grounds of Federal law to present to this Court, but even beyond that, the validity of the law was never formerly drawn in question which renders insufficient Appellant's request for review under the appeal jurisdiction of this Court.

CONCLUSION

Appellee in the above entitled case moves this Court to dismiss (and/or affirm) on the grounds (1) that Appellant has misconstrued his jurisdictional remedy and that this Court should consequently dismiss his appeal for lack of jurisdiction, and further (2) that

the questions presented are so insubstantial as not to need further argument and that this Court should consequently affirm the decision of the Court of Appeals of the State of New York holding for Appellee.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

DOLOMITE PRODUCTS CO., INC. *v.* KIPERS ET AL., CONSTITUTING TOWN BOARD OF TOWN OF GATES, NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 619. Decided December 4, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.